LAW AND CONTEMPORARY PROBLEMS

INTERNATIONAL HUMAN RIGHTS: PART II

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LAW AND CONTEMPORARY PROBLEMS

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LEGAL PROBLEMS OF FREEDOM OF INFORMATION IN THE UNITED NATIONS

ZECHARIAH CHAFEE, JR.*

Without attempting to cover all the legal problems connected with freedom of information in the United Nations, this article will be mainly devoted to those presented by Article 17 of the Covenant on Human Rights while the author was participating in its formulation.

The promotion of fundamental human rights is repeatedly mentioned in the Charter as one of the chief purposes and functions of the United Nations,[1] and the Commission on Human Rights is, apart from the still unorganized Military Staff Committee, the only body lower than the Councils which is specifically required by the Charter.[2] The right to freedom of information, which corresponds to "freedom of speech and of the press" under the First Amendment in our Constitution, was made the object of special attention when the General Assembly in December 1946 called the International Conference on Freedom of Information. The Commission on Human Rights early in 1947 set up a Sub-Commission on Freedom of Information and of the Press. This devoted most of its first session, in May-June 1947, to planning the organization of the Conference.[3] Soon afterwards, the Economic and Social Council settled that the Conference should meet at Geneva on March 23, 1948.

The Commission on Human Rights, at its second session, in December 1947 at Geneva, began drafting the International Covenant on Human Rights, and blocked out articles dealing respectively with most of the fundamental rights intended to be protected.[4] However, it decided not to elaborate a final text of Article 17 on freedom of information until it had before it the views of the Sub-Commission and the Geneva Conference.[5] Accordingly, the Commission referred to the Sub-Commission for its consideration two tentative drafts of Article 17, which had been laid

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[1] U. N. CHARTER, Preamble; Art. I, 3; Art. XIII, 1b; Art. LXII, 2; Art. LXVIII, 2; Art. LXXVI, c.

[2] U. N. CHARTER Art. LXVIII, 2.

[3] REPORT OF THE FIRST SESSION OF THE SUB-COMMISSION ON FREEDOM OF INFORMATION AND OF THE PRESS, June 5, 1947 (E/441, pp. 3-16).

[4] REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, Annex B, pp. 30-40).

[5] *Id.* at 33.

before the Commission, one by its Working Group on the Covenant, the other by the Representative of the United States. (These are reprinted in Appendix I.)

The Sub-Commission began its second session at Lake Success on January 19, 1948, and gave the greater portion of its time to Article 17 of the Covenant. This body differs from the Commission on Human Rights in not being composed of representatives of governments. The twelve members of the Sub-Commission are appointed as experts from twelve different countries. Although each member's government must approve his serving, he does not act under orders from that government but is, for the time being, an official of the United Nations. He receives much help from the permanent officials of his own State Department or Foreign Office, and naturally pays considerable respect to the wishes of his government. Otherwise his work might come to naught when it is reviewed by bodies higher up in which his government is directly represented, like the Commission on Human Rights or the Economic and Social Council. In the end, however, he decides for himself what is best in the interest of the United Nations. This power of independent judgment possessed by the members of the Sub-Commission produced a strong sense of common responsibility. Most of us had been at the first session and so became accustomed to working together. We met each other often in pairs or small groups at lunch at Lake Success and at dinner in New York, where troublesome matters of phraseology were sometimes straightened out during the evening. Because of the general mastery of English, pieced out by tolerable French, linguistic barriers hardly existed. Simultaneous translation facilitated the exchange of views at the conference table. Several members had legal training, relevant to the task of drafting part of a treaty, including the chairman, G. J. Van Heuven Goedhart (Netherlands). He is now chief editor of a large Amsterdam newspaper. The members who were not lawyers were experienced in journalism. Regardless of some sharp differences of opinion the Sub-Commission was an admirable and enjoyable working unit.

As the starting point for the Covenant article, a choice was soon made of the tentative text from the Working Group of the Human Rights Commission (see Appendix I, Draft 1). During most of a fortnight the Sub-Commission hammered out the draft for Article 17 which is reprinted as Draft A in Appendix II. This, with only one or two negative votes, it decided to recommend to the Commission on Human Rights.[6]

Less than two months later, the United Nations Conference convened at Geneva on March 23, 1948. The task of drafting Article 17 of the Covenant was referred to Committee IV, on law and continuing machinery. The chairman, Sir Ramaswami Mudaliar (India), is prime minister of Mysore, and the rapporteur, Fernand Dehousse (Belgium), is Professor of International Law at the University of Liège and sits on the Commission on Human Rights. Many members of Committee IV were lawyers, and others were government officials with lawyerlike minds. The conditions

[6] REPORT OF THE SECOND SESSION OF THE SUB-COMMISSION ON FREEDOM OF INFORMATION AND OF THE PRESS, Feb. 6, 1948 (E/CN. 4/80, p. 4).

of work were different than in the Sub-Commission. At Geneva we were delegates of our respective governments, bound to act in consultation with our co-delegates and the permanent officials in the national group, and subject to directives cabled from the home capital. Each nation tended to act as a separate unit. There was little opportunity (as in the Sub-Commission) for progress through informal meetings of a few men from diverse countries who had got to know each other intimately. At sessions, instead of twelve men sitting close together around a single table, forty or more delegates in Committee IV occupied at least half a dozen tables. (Each of the fifty-four nations present at the Conference had the right to attend the committee and speak, but only representatives of members of the United Nations could vote.) So one had the sense of addressing a mass meeting rather than trying to persuade individuals. Indeed, the speaker knew that there was little use in convincing his listeners, since the real decisions were usually not made by them but by hundreds of people outside the room. The necessity of a long interval for translating each speech broke the continuity of discussion, although it had the advantage of giving an opponent plenty of time to collect his thoughts for a reply. There was no danger of blurting out the first idea that came to mind, as with simultaneous translation. A final contrast to the atmosphere in the Sub-Commission was caused by the intervening *coup d'etat* in Czechoslovakia, which produced a considerable strain right through the Geneva Conference. Despite all these obstacles, the members of Committee IV developed a notable *esprit de corps*. They wasted little time on eloquent and prolonged denunciations of other countries, but "made a noise like a lawyer" and kept steadily at work on rather tedious tasks with a common attitude toward problems of law and draftsmanship.

One significant observation at both the Sub-Commission and the Conference was how little embarrassment arose from the differences between the law of Continental Europe and the Anglo-American law. Lawyers were lawyers, in whichever system they had been trained. In the area of international freedom of information, at any rate, they understood each other and knew the same craftsmanship.

Committee IV used the Sub-Commission draft (A in Appendix II) as the basis of work on the Covenant. It made some improvements in phraseology, and several important changes in substance to all of which the writer found himself opposed. Still, he felt that the conference draft should be approved in principle, leaving modifications to be made by the Commission on Human Rights. The other members of his delegation took a different view, and the United States accordingly joined the Soviet bloc in a minority of 7, which opposed the committee's draft in plenary session.[7] The majority adopted the work of Committee IV without change. This conference draft for Article 17 is reprinted as Draft B in Appendix II, and has for all practical purposes superseded the Sub-Commission draft.

[7] REPORT OF THE UNITED STATES DELEGATES, UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION 6-8 (Dep't State Publication 3150, International Organization and Conference Series III, 5).

Nothing much has happened since to Article 17 of the Covenant. The Commission on Human Rights, in its third session at Lake Success in May-June 1948, finished the Declaration on Human Rights, subsequently adopted by the General Assembly. Article 19, on freedom of opinion and expression, continues (with minor changes) the draft made for the Declaration by the Sub-Commission and substantially approved by the Geneva Conference. The Commission did not have time to consider the Covenant in detail.[8] At its recent fifth session at Lake Success in May-June 1949, the Commission revised many articles of the Covenant, but decided to postpone consideration of the text of Article 17 until its sixth session.[9]

Meanwhile, the Drafting Committee of the Commission has been considering three drafts, among which it has not yet made a choice. Besides the Conference draft, Appendix II reprints a French draft (Draft C), because it probably has strong backing and embodies a principle which was unsuccessfully urged by the United States at the Geneva Conference. This French draft will be mentioned later in connection with the problem of specific as against general limitations. The third text now before the Commission comes from the Soviet Union.[10] It flatly denies protection to freedom of speech and press when "used for war propaganda for inciting enmity among nations, racial discrimination and the dissemination of slanderous rumours." Some of the ideas in the Soviet draft bear on the problem of the Indian Amendment, hereafter discussed.

This is the chronological framework within which the legal problems presented themselves. Unless otherwise indicated, only the author is responsible for the reflections which follow. There is reason to believe that some of them were shared by other members of the Sub-Commission, but the pressure of concrete issues of drafting was too great to allow accurate ascertainment of the extent of agreement on the theoretical matters here discussed.

First, some problems had to be answered about the Covenant as a whole in order to understand the effect of Article 17.

I

FOR WHAT SORT OF WORLD WOULD THE COVENANT BE IN FORCE?

A concept which dominated all the thinking in the Sub-Commission was that the Covenant on Human Rights was not getting drafted for this troublous period of settling down after a great war, but for the better years ahead. The nations are still playing the old game of territorial aggrandizement and competing armaments which has culminated twice in a world war. They must play the new game made possible by the United Nations before an international guaranty of freedom of speech and other human rights can work with the effectiveness of law. In past treaties, nation A has occasionally promised nation B to protect the rights of citizens

[8] REPORT OF THE THIRD SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 28, 1948 (E/800, p. 5).

[9] REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, p. 34).

[10] *Id.* at 34-35.

of B who are sojourning within the borders of A, but this is the first time in history when it is seriously proposed that each of several nations shall obligate itself to protect the human rights *of its own citizens.* A start in this direction has already been made by the recent peace treaties with Italy, Hungary, and other nations, but these are defeated countries, whereas the Covenant is to apply inside victorious countries. Furthermore, the subsequent ill success of the guaranties of human rights in these peace treaties demonstrates the futility of such international obligations unless they are to be performed in a more orderly world than now exists.

The Sub-Commission never debated the desirability of the Covenant. That was a question for the Commission on Human Rights. The Commission had given us a job to do and we did it. "Theirs not to reason why . . ." But it was provided in Article 23 of the draft Covenant, as it was laid before the Sub-Commission in January 1948, that the Covenant should not come into force until two-thirds of the members of the United Nations had acceded to its terms.[11] Obviously an enormous change would have to take place in the attitudes of many nations toward liberty before over thirty-five countries would be willing to bind themselves by the Covenant. A good many years would elapse before the requisite number had been obtained. The Sub-Commission was planning Article 17 for the distant future and could ignore present stresses and strains.

This concept that we were drafting law to operate in a régime of international order and not in crises was shared, it is believed, by many members of the Sub-Commission. Though not made articulate at the conference table, it was constantly felt. The concept was strengthened by Article 4, which permitted the obligations of the Covenant to be lifted in time of war or other public emergency within a state.[12]

At the Geneva Conference, however, one sensed quite a different attitude. The intervening Czech crisis had focused the attention of delegates on wars and threats of wars, and on the possible need of protection from objectionable utterances within their respective countries. A proposed provision of Article 17 frequently seemed to evoke the question, "Would this prohibition of suppressive legislation hurt *my* country *now?*"

Although the writer strongly believes that such a feeling should not dominate the drafting of Article 17 or any other part of the Covenant, nevertheless so long as

[11] REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, *op. cit. supra,* note 4, at 35. Subsequent drafts of Article 23 in the Human Rights Commission may give the Covenant an earlier operation; they provide that it shall come into force when———member nations have deposited their instruments of accession with the Secretary-General. REPORT OF THE THIRD SESSION, *op. cit. supra,* note 8, at 34; REPORT OF THE FIFTH SESSION (E/1371, pp. 41, 60). Still, if the blank is filled with a large number, a more orderly world will be necessary before the required number of nations accede to it. And if only a few nations can bring the Covenant into force, its effect on the promotion of human rights is likely to be correspondingly small.

[12] The draft before the Sub-Commission reads: "In time of war or other public emergency, a State may take measures derogating from its obligations under Article 2 above to the extent strictly limited by the exigencies of the situation." A state so derogating must inform the Secretary-General of the measures taken and the reasons therefor, and notify him when the measures cease to operate (E/600, pp. 30-31). Article 4 has been modified at later sessions of the Human Rights Commission, but the privilege of derogation remains (E/800, p. 16; E/1371, pp. 29, 56, 57).

this feeling prevails, it is unwise to put Article 17 into final form. At least, that action should be deferred until the peace treaties with Germany and Japan have been formulated and executed and successfully carried out. For one thing, the content of Article 17 (as will hereafter be argued) ought to depend greatly on the provisions for its implementation which will be established by later articles of the Covenant. No implementation provisions have yet been drafted, and the author ventures the opinion that it is impracticable to determine the precise nature of methods for enforcing human rights inside a nation's territory while the present disturbed condition of the world continues.

This position does not mean that work on Article 17 is now in vain. It is well worth while for carefully chosen groups of men and women to think ahead and write out the best possible free speech article they can make, so that it will be ready for use when the right time arrives for its adoption by many nations. That is far wiser than putting everything off. On the other hand, the draftsmen of today ought to contemplate the probability that their work will have to be revised in better times than ours. Whatever is done before the peace treaties are out of the way should be regarded as tentative and preparatory. The final formulation of the International Covenant on Human Rights ought not to be hurried. The most ardent supporters of that document would be wise to wait until they can be sure that there is a strong desire among officials and peoples to obey it. Otherwise, the Covenant may be just a piece of paper like the Kellogg Pact. And delay does not mean that the intervening time will be lost. Every opportunity for fruitful discussion of the provisions of any draft should be utilized. Thus their ultimate form will be improved, and widespread familiarity with the Covenant will build up a respect for it which will increase its prospects of effective operation when it does eventually go into force.

II

THE COVENANT COMPARED WITH OUR OWN BILL OF RIGHTS

The rights protected by the various articles of the Covenant are, for the most part, the same as those guaranteed by the first ten amendments to the United States Constitution, which are commonly thought of as our Bill of Rights. Reflection shows, however, that the Covenant has a very different function from these amendments. They were framed because the peoples of the states wished to restrict the powerful central government which had just been established by the main portion of the Constitution. The Covenant does not restrict the new central government established at San Francisco in 1945. The United Nations has very few governmental powers, and they are too weak to need much restraining. The only genuine parallel to our Bill of Rights[13] is in the Charter. Article 2, paragraph 7, refusing

[13] Another restriction on the United Nations is the veto power of any one of the five permanent members of the Security Council. Article 27, 3. But it would be hard to find a parallel to this in our Constitution. The Virginia and Kentucky Resolutions unsuccessfully sought to impose an even tighter restriction on the new central government, by giving a veto power to every state, no matter how small.

to authorize the United Nations to intervene in "matters which are essentially within the domestic jurisdiction of any state . . ." somewhat resembles the Tenth Amendment, which reserves to the states or to the people the powers "not delegated to the United States by the Constitution. . . ."

The Covenant is intended to restrict the powers of the member nations which choose to accede to it. Hence the true analogy to it will be found outside our original Bill of Rights in the limitations on the powers of the states in the main body of the Constitution, and in the Thirteenth, Fourteenth, Fifteenth, and Nineteenth Amendments.

Here it is important to observe that our constitutional limitations on state powers fall into two types—those concerning interstate and foreign matters and those concerning the relations of a state with its own citizens.

In the original Constitution, restrictions of the first type predominate. The states are forbidden to engage in several activities which are appropriate only to the national government. These reach across state lines and national frontiers, by their very nature or by their immediate consequences. Many of these prohibited activities do not concern human rights, *e.g.*, coining money, levying import duties, etc., so only those relevant to our purposes will be mentioned. By implication, a state may not pass laws which burden interstate or foreign commerce.[14] Hence it cannot interfere with freedom of residence within the United States by preventing persons from entering from another state.[15] Again, the supremacy of treaties may result in protecting the fundamental rights of an alien against state interference.[16] A provision that might have become significant for human rights, but has been little invoked for that purpose, is: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[17] Finally, the impartial enforcement of rights entitled to federal supervision is obtained by the establishment of United States courts, in which citizens of different states can sue each other, an alien can sue a citizen or *vice versa,* and anybody can assert claims under the Constitution or an Act of Congress or a treaty.[18]

In the foregoing situations, there is a considerable resemblance to international law as it was customarily regarded before the Second World War. The community of nations stood in somewhat the same position toward separate nations as the United States toward separate states. International courts, arbitration tribunals, and diplomatic negotiations ordinarily concerned themselves with affairs inside a state only when these affairs affected the subjects or the government of another state.

Not until we examine the second type of restrictions in our Constitution do we find anything closely like the Covenant. It is noteworthy, however, as Holcombe

[14] U. S. CONST. Art. I, §8; Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).
[15] Crandall v. Nevada, 6 Wall. 35 (U. S. 1867); Edwards v. California, 314 U. S. 160 (1941).
[16] U. S. CONST. Art. VI, §2; Ware v. Hylton, 3 Dall. 199 (U. S. 1796), and many subsequent decisions.
[17] U. S. CONST. Art. IV, §2.
[18] *Id.* Art. III, §2.

points out in his useful book *Human Rights in the Modern World* (1948), that the Philadelphia Convention was very cautious about limiting the powers of a state over its own citizens. Again considering only provisions protecting human rights, we find that no state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts,[19] and that the United States (construed to mean Congress) shall guarantee to each state a republican form of government[20]—a power fortunately never needed as yet. Apart from these two clauses, a state government before the Civil War could deal as oppressively as it pleased with its own citizens.

Of course, most states already had their own constitutional guaranties against such tyranny, but if a state chose to repeal or disregard these guaranties, the national government could do nothing about it under the original Constitution. It was equally powerless to interfere after the adoption of the first ten amendments in 1791. A state might abolish freedom of the press and jury trial in criminal cases, and do everything else which the Bill of Rights forbade the national government to do, and yet neither Congress nor the federal courts could interfere.

Perhaps this was just as well, when we remember the difficulty with which the young central government was established in the face of state jealousies. Chief Justice Marshall had his hands full to maintain strictly national interests against local opposition without also undertaking to interpose between one of the sovereign states and some individual within its borders, merely because his human rights were infringed. Think of the clashes which would have ensued if the Supreme Court of 1810 (in accordance with the decisions of our time) had upheld freedom of speech by releasing a Negro convicted in a Georgia court for urging blacks to demand the vote and had upheld freedom of religion by upsetting the centuries-old custom of Massachusetts towns to pay the Congregational minister's salary out of taxes. It is doubtful whether the Court would have been obeyed and whether the nation could have withstood such strains in its early years.

Can the much weaker central government of the United Nations afford to take on comparable tasks while it is just starting its life? Holcombe thinks not. It was not for nearly eighty years after its foundation, he recalls, that our central government, when greatly strengthened by the Civil War, obtained the power to protect inside the states those fundamental rights which the Covenant proposes to guarantee within a decade after the adoption of the Charter. The Thirteenth Amendment abolished slavery like Article 8 of the Covenant. The Fourteenth Amendment expanded the scope of the old privileges and immunities clause and made it include the citizens of an offending state, by providing that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"; but this clause, though greatly beloved by laymen who write about constitutional law, has been little invoked by lawyers.[21] Far more important for human

[19] *Id.* Art. I, §10.
[20] *Id.* Art. IV, §4.
[21] *See* Edwards v. California, *supra* note 15; Hague v. C. I. O., 307 U. S. 496 (1939).

rights is the succeeding clause of the Fourteenth Amendment, "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ." The word "liberty" is now interpreted by the Supreme Court to cover all the fundamental human rights which are protected against national action by the Bill of Rights of 1791, and consequently safeguards them against state governments as well. In the field of freedom of information, for instance, the prohibitions of the First Amendment are in effect applied to upset suppression under state legislation. Nevertheless, as Holcombe emphasizes, this result was not reached until 1925,[22] sixty years after the adoption of the Fourteenth Amendment and a hundred and forty years after the Philadelphia Convention, when the power of the central government had become enormous in comparison with the power of the states which it thus restrains.

Holcombe's inference from our own experience is that the United Nations should, for some time to come, follow the analogy of the first type of restrictions on the states in our Constitution and confine its concern with human rights to those situations inside one nation which affect the interests of another nation or of the United Nations. As to the last point, Holcombe would make over a clause from the Fourteenth Amendment and have a treaty agreeing that no signatory state would abridge the privileges or immunities of a citizen of the United Nations. Since there is no easy way to tell what those privileges and immunities are and little help can be obtained from Supreme Court cases about the corresponding phrase in our Constitution,[23] the writer has nothing to say about this suggestion until it is embodied in some actual UN proposal. Then we can know exactly what we are discussing.

There is considerable force to Holcombe's main conclusion, that the best chances of immediate success are in tackling human rights problems which cross international boundaries and involve more than one country. When a treaty obligating one nation directly promotes the interests of another nation, as is usually the case, then this second nation has incentives to sign it and to complain if it be violated. Such a treaty is more likely to be faithfully carried out than a treaty like the Covenant, where outside nations may have no cause for objecting to violations beyond an abstract devotion to fundamental human rights. Furthermore, some agreements of the sort Holcombe envisages are badly needed. An example which occurs to the writer is an agreement among many nations that when a female citizen of one country marries a male citizen of another country, she has the right to leave her own land and join her husband at his home. It would be even better if he too were allowed to emigrate and live with his wife whenever they prefer her country to his.

In the area of freedom of information, great importance attaches to a much freer flow of news and ideas across frontiers. This was stressed by the General Assembly in calling the Geneva Conference. The most fruitful achievement of

[22] Gitlow v. New York, 268 U. S. 652 (1925).

[23] See cases cited note 21 *supra*.

that Conference consisted of two draft conventions, one proposed by the United States to facilitate the gathering of news by foreign correspondents and its transmission to their own journals at home,[24] the other proposed by France to establish an international right of correction of statements of fact in news reports sent from one country to another.[25] These two conventions, after many vicissitudes, have been happily merged into one and put in final form by the General Assembly in May 1949.[26] If all goes well, this Convention on the International Transmission of News and the Right of Correction will be signed by many nations long before work is completed on the Covenant on Human Rights. Here is just the thing Holcombe desires.

Yet the United Nations cannot, as Holcombe urges, stop there. The Convention is excellent, but it will not be regarded as a reason for shelving Article 17 of the Covenant. Whether it be wise or not for the Human Rights Commission to concern itself with the relations of a government to its own citizens, the pressure to go on with the Covenant is too strong for work on it to cease now. And contrary to a common belief among American lawyers, this pressure does not come from the Soviet Union or its satellites. An examination of the votes in the Commission, the Sub-Commission, and the Geneva Conference will show that the Soviet bloc have almost always been against doing anything positive for freedom of information and other human rights, so long as their own extraordinary wishes could not be carried out. Thus they were about the only nations which did not vote for the Declaration of Human Rights in the General Assembly, but insisted on abstaining. The demand to do something notable for human rights has come from the freedom-loving nations of the West and from India and Australia.

A striking illustration of this demand was furnished by the Draft Convention on Freedom of Information, proposed by the United Kingdom at Geneva.[27] This instrument would enable any two or more nations to guarantee freedom of information within their own borders immediately, in the same terms as Article 17. There would be no delay while the Covenant is getting finished by the Human Rights Commission, or before it is signed by the large number of nations required by Article 23.[28] Thus this treaty undertakes to hasten the very type of UN activity which Holcombe says ought to be postponed. The writer was unable to understand the reasons why the British drafted this document. It seemed so un-English, in that it asserted general principles and did not meet any pressing concrete need as did the American and French conventions. It aroused speculations whether the Labor Government was carrying England back into the mental attitudes of the Commonwealth Period, the one epoch in English history when laws were urged for abstract

[24] UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, FINAL ACT (Annex A, p. 7).
[25] *Id.* at 11.
[26] A/876, May 16, 1949.
[27] UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION, *op. cit. supra,* note 24, at 14.
[28] *See* note 11, *supra.*

reasons. Be this as it may, the important fact is that the British convention received widespread support at the Conference from other freedom-loving delegates, was overwhelmingly adopted at the plenary session, and seems likely to be signed by several nations whenever it is submitted by the General Assembly. It even led to the startling suggestion in the Human Rights Commission last June that Article 17 might be omitted from the Covenant as a useless duplication of the British convention.[20] A Bill of Rights which omitted freedom of speech and press would indeed be a novelty.

To summarize what can be learned for UN purposes from our own constitutional experience with human rights: It is useful because it indicates the probable areas for rapid success and because it warns against biting off more than you can chew. Yet this experience is not quite in point. There are at least two reasons why it may be neither necessary nor desirable for the United Nations to imitate our decades of delay before undertaking to establish human rights inside the states.

First, the Covenant requires less strength in the central agency than does the Fourteenth Amendment. Our federal courts have enough power behind them to let the victims of state oppression out of prison and sometimes to put the oppressors themselves into prison. Nobody contemplates any such drastic action by the Human Rights Commission or by any other UN body. Just how the rights in the Covenant are to be implemented is not yet decided, but we may reasonably expect measures like the receipt of complaints of violations with discussion in documents and UN meetings. Perhaps there will also be authorization for an impartial investigation and a report. Publicity will probably be the chief sanction for the Covenant. If we can only get the peace treaties out of the way and obtain a better international feeling than now prevails, "a decent respect to the opinions of mankind" may be enough to make the Covenant operate with as much compliance as many domestic statutes receive, even though the United Nations is given no power to proceed by force against violators.

Secondly, lawmakers in each epoch have to face the needs of that epoch. The practical men who met at Philadelphia in 1787 knew this well and did not undertake to impose restrictions on the states unless they were urgently required by existing conditions. There was no pressing reason then to guarantee human rights inside the states, because the states were doing a pretty good job at this themselves—apart from slavery, which it was impossible to touch. Whenever restrictions on the states were badly needed, for example to stop the issue of irredeemable paper money, the framers unhesitatingly wrote them into the Constitution, regardless of the danger of clashes with state governments. The lawmakers for the United Nations ought to show corresponding courage and resourcefulness in confronting the pressing needs of our time, and one of these is for some sort of restraints on nations to lessen the suppression of public discussion and attacks on other cherished human

[20] REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, *op. cit. supra*, note 9, at 34. This query was made by the representative of China.

values. There are few more potent causes of international ill-will than when a nation denies basic freedoms inside its boundaries. Such a nation becomes a plague-spot. When our own government is protesting the trial of a Hungarian Cardinal in Hungary and the trial of Bulgarian Protestant ministers in Bulgaria, it is no longer possible to regard religious freedom and a fair trial as purely domestic matters.

The examples just cited demonstrate the impossibility of rigorously maintaining the distinction, suggested by Holcombe's book, between a nation's denial of human rights to its own citizens and to foreigners. Despite what was previously said, the latter situation is not the only source of serious resentment in other nations. Many men who owe allegiance to different governments are united by strong emotional ties of race, blood, or religion, or by a common devotion to trade-unionism, science, or scholarship, and so feel deeply the sufferings of their fellows regardless of political divisions. Milton's sonnet *On The Late Massacre in Piedmont,* Secretary Hay's protest against Russian pogroms, the manifesto of the Faculty of the University of Amsterdam upon the fate of professors in Nazi Germany—these are only a few proofs that international concern is not confined to the rights and wrongs of resident aliens. Probably that is the best place to start, as in the French and American conventions at the Geneva Conference, but it is not the place to stop.

III

WOULD ARTICLE 17 BE PART OF AN UNCONSTITUTIONAL TREATY?

The two preceding paragraphs seem to take care of the objection raised by a distinguished lawyer, Carl B. Rix, in a recent address to the American Society of International Law, that the Covenant may be outside the treaty-making power of the President and the Senate[30] because of being domestic legislation.[31] This objection rests on what Chief Justice Hughes said to the same Society in 1929 about possible limits on the treaty-making power:[32]

> [This] is a sovereign nation; . . . the nation has power to make any agreement whatever in a constitutional manner that relates to the conduct of our international relations, unless there can be found some express prohibition in the Constitution . . . *But if we attempted to use the treaty-making power to deal with matters which did not pertain to our external relations but to control matters which normally and appropriately were within the local jurisdictions of the States,* then . . . there might be ground for implying a limitation upon the treaty-making power that it is intended for the purpose of having treaties made relating to foreign affairs and *not to make laws for the people of the United States in their internal concerns. . . .*

One can imagine examples within Hughes' limitation, like a treaty with Eire providing that Boston should have a city-manager form of government with pro-

[30] U. S. CONST. Art. II, §2.

[31] Rix, *Human Rights and International Law: Effect of the Covenant Under Our Constitution,* 35 A.B.A.J. 550, 554, 618 (1949).

[32] PROC. AM. SOC'Y INT'L L. 195-196 (1929). (Italics supplied.)

portional representation or a treaty with Great Britain restoring primogeniture in Virginia. Nevertheless, as just shown, freedom of information is no longer a local concern. It is something which nations do now put into treaties. It is in several of the peace treaties already concluded since 1945, and most of the nations at the Geneva Conference approved the British draft convention, which dealt with nothing except freedom of information.

IV

IS ARTICLE 17 INVALIDATED BY THE "DOMESTIC" CLAUSE OF THE CHARTER?

This problem received no attention from the Sub-Commission or the Geneva Conference. We took it for granted that the Economic and Social Council and the Human Rights Commission knew their business when they undertook an International Bill of Rights and the Covenant. However, the Soviet member of the Sub-Commission and several prominent lawyers in the American Bar Association have argued that the UN is prevented from having any voice in the relations between the individual and his government by Article 2, section 7, of the Charter, which says:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in any matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . .

If this important provision really bars any concern with human rights and fundamental freedoms, all the Charter clauses mentioned earlier as dealing with such matters would be meaningless. Yet they are just as much a part of the Charter as the provision about domestic matters. Consequently, we must apply the principle with which all lawyers are familiar, that when there is an apparent inconsistency between different portions of a constitution or statute, then it is necessary to read each provision in connection with the others and try to reach a mutual adjustment which makes sense and gives effect, if possible, to every part of the document. When the draftsmen at San Francisco wrote Article 68 ordering the Human Rights Commission, they certainly did not think that they were writing nonsense. They were well aware of the provision on domestic matters and obviously intended that the Human Rights Commission should be able to do *some* work which was not forbidden by Article 2.

It is true that there are difficulties about the precise limits of the "domestic" clause in this connection, but the work already undertaken by the UN in the field of freedoms seems plainly outside the scope of that clause. Much of it consists of the studies, reports, and recommendations which are expressly mentioned in other articles of the Charter. They are not intervening; they do not require the member nations to submit such matters to settlement. As for the Covenant and the Geneva draft treaties, these are to bind only nations which consent to be bound. Many existing treaties relate to matters within a nation, for example, by guaranteeing to citizens

of another government the right to inherit land on equal terms with native citizens. Of course it is no violation of national sovereignty for a nation to agree with another that it will make a desirable change in its own laws. One of the chief values of the UN is to act as a sort of clearing house for facilitating treaties which will remove or lessen local causes of international friction. The numerous labor conventions adopted under the auspices of the League of Nations and the UN are a conspicuous illustration of this, and the increase of freedom is an equally appropriate subject for future treaties.

V

SHOULD ARTICLE 17 BE SELF-EXECUTING?

Although the Sub-Commission and the Geneva Conference could do nothing about this question, which arises for all the rights in the Covenant and has been the object of earnest thought in the State Department, the importance of the problem became evident to the writer during the drafting of Article 17. The binding effect of its formulation of the right to freedom of expression depended on the overall obligations of the signatory nations, as set forth in Article 2. At the time we were working, in the early months of 1948, the critical portion of Article 2 had the following form:[88]

"Every State, party hereto, undertakes to ensure:

> (a) that its laws secure to all persons under its jurisdiction, whether citizens, persons of foreign nationality or stateless persons, the enjoyment of these human rights and fundamental freedoms;"

It will be convenient to break down the problem into four parts: (1) the difference between self-executing treaties and other treaties; (2) whether a treaty has to be self-executing in the United States; (3) the undesirability of allowing the Covenant to be self-executing in the United States; (4) methods of preventing this.

A. The Difference between Self-Executing Treaties and Other Treaties

There are two aspects to the binding effect of a treaty. In the first place, it becomes internationally binding after the performance of certain acts. In many nations the consent of the executive alone is enough. By our Constitution ratification by two-thirds of the Senate is also required. In addition the treaty may itself provide for further acts before it becomes effective, for instance, the deposit of ratifications, but this element need not concern us. The point is that when the required acts have been performed, the good faith of each acceding government is pledged to the performance of the treaty. A violation of a treaty obligation may lead to diplomatic remonstrances and to stronger acts by the other parties to the treaty. Violation may also become the subject of a proceeding before an international tribunal. For present purposes it will be assumed that our government will take all the necessary

[88] SECOND REPORT OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, p. 30). The modifications of this text in later reports are set forth *infra* notes 63 and 64.

steps to make the Covenant on Human Rights binding upon it in the manner just described.

Secondly, a treaty such as the Covenant is intended to become binding upon the officials and private citizens of the signatory parties. Probably no treaty ever proposed was meant to affect private rights and duties within a country so extensively as the Covenant. It is contemplated that violations of its terms will give rise to actions in domestic courts by the victims against wrong-doing officials.[34] The main problem is to ascertain the method by which this domestically binding effect of the Covenant may most wisely be obtained.

This domestically binding effect of a treaty does not inevitably accompany its internationally binding effect. In some countries, notably the United Kingdom and the members of the British Commonwealth of Nations, most treaties do not have any effect upon private rights until they have been implemented by Act of Parliament or other appropriate domestic legislation. In a famous case in the Privy Council, *Walker v. Baird*,[35] treaties between Great Britain and France gave French fishermen certain rights on parts of the Newfoundland coast and provided that no lobster factories should be operated on these shores. The plaintiff ran such a factory. A British naval captain forcibly closed it up. Because no Act of Parliament had been passed to implement the treaty and make it affect the private rights of British subjects, the naval captain was held liable in damages to the owner of the factory. The fact that the captain's action was an enforcement of the treaty was no defense. The winning counsel argued:[36]

> No case can be found in which the Crown has attempted in time of peace to affect by treaty the private rights of its subjects. For that purpose an Act of Parliament is necessary . . . . There is no authority for saying that State necessity will make a treaty binding upon subjects by force of the prerogative. Such a doctrine would extend the prerogative of the Crown so as to enable it to deprive the subject of his property and rights.

This British theory of treaties was recognized by Justice Miller.[37]

Consequently, if the Covenant on Human Rights is ratified by the United Kingdom, it will not become binding on British subjects or in the British courts until implementing legislation is enacted by parliament. In other words, the Covenant will not be self-executing in the United Kingdom.

[34] *Ibid.* Article 2(c) and (d). These became (b) and (c) in Report of the Third Session (E/800, p. 15). They are now merged without substantial change into Article 2, §2. REPORT OF THE FIFTH SESSION (E/1371, p. 28): "Each State . . . undertakes to ensure that any persons whose rights or freedoms . . . are violated shall have an effective remedy before the competent national tribunals notwithstanding that the violation has been committed by persons acting in an official capacity."

There seems to be no ground for the fear, expressed by some American lawyers, that these clauses about court actions under the Covenant are self-executing regardless of the opening passage of Article 2. These clauses simply demarcate the consequences of the Covenant *after* it is made a part of domestic law, in accordance with the obligations of international good faith. Recall that these clauses will apply in nations like Great Britain, where treaties are never self-executing.

[35] [1892] A. C. 491. [36] *Id.* at 494.

[37] United States v. Rauscher, 119 U. S. 407, 417 (1886).

In the United States, ordinarily, treaties are self-executing. Article VI of our Constitution provides that "all treaties . . . shall be the supreme Law of the Land. . . ." For example, if we make a treaty with France that when a French citizen dies in this country his property shall descend like that of American citizens, this treaty automatically nullifies as to the French heirs of a dead Frenchman a state law forbidding foreigners to inherit land in that state. No Act of Congress and no state statute is required to implement the treaty with France.

The doctrine was recently applied in *Bacardi Corporation v. Domenech*.[38] The Inter-American Trade Mark Convention of 1929 provided that every mark duly registered in one of the contracting states should be "legally protected" in the other contracting states. The plaintiff had a license to use registered Cuban trademarks in Puerto Rico, but a Puerto Rican statute made it illegal for him to do so. No Act of Congress implementing the Convention was mentioned, but the statute was held invalid to the extent that it conflicted with the Convention. Chief Justice Hughes said:[39] "This treaty on ratification became a part of our law. No special legislation in the United States was necessary to make it effective." Perhaps this result was somewhat aided by a clause in the Convention that its provisions should "have the force of law in those States in which international treaties possess that character, as soon as they are ratified by their constitutional organs."

Subsequently, the Warsaw Convention for Unification of Rules as to International Transportation by Air was held to be self-executing for the purpose of limiting the amount of recovery in two damage actions arising out of airplane accidents.[40]

B. Does a Treaty Have to Be Self-Executing in the United States?

Despite what has just been said, it is possible for the government of the United States to make treaties which are not self-executing but which must be implemented by Act of Congress. An obvious example is a treaty providing that our government shall pay a sum of money. Then nothing happens until Congress appropriates the money. This was pointed out nearly a century ago in *Turner v. American Baptist Missionary Society*.[41] Even before this, Chief Justice Marshall had held, in *Foster v. Neilson*,[42] that the treaty acquiring Florida from Spain was not self-executing as to its clause confirming Spanish land grants, but that such a grant must in addition be approved by a board of commissioners which had been established by Congress after the treaty. In short, the Act of Congress in this case implements the treaty just as an Act of Parliament implements a British treaty.

In the course of rejecting the plaintiff's claim under a grant which the commissioners had not confirmed, Marshall quoted the treaty provision that all the Spanish

[38] 311 U. S. 150 (1940).
[39] *Id.* at 161.
[40] Indemnity Insurance Co. v. Pan American Airways, 58 F. Supp. 338 (S. D. N. Y. 1944); Garcia v. Pan American Airways, 269 App. Div. 287, 55 N. Y. S. 2d 317 (1945).
[41] 24 Fed. Cas. 344, No. 14,251 (C. C. Mich. 1852).
[42] 2 Pet. 253 (U. S. 1829). *Accord: Ex parte* Dove, 49 F. 2d 816 (D. Minn. 1945).

grants "shall be ratified and confirmed to the persons in possession" to the same extent as if Florida had not been ceded, and asked:[43]

> Do these words act directly on the grants, so as to give validity to those not otherwise valid; or do they pledge the faith of the United States to pass acts which shall ratify and confirm them?
>
> A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is intra-territorial; but is carried into execution by the sovereign power of the respective parties to the instrument.
>
> In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.

Additional cases holding treaties not to be self-executing will be mentioned later, as well as several other treaties made by the United States which contemplate legislation before they become operative as domestic law.

C. Article 17 and the Rest of the Covenant Should Not Be Allowed to Be Self-Executing in the United States

At the outset it is important to observe that, so far as state law is concerned, the Covenant cannot be self-executing if Article 24 is retained substantially in its present form. This provides that in a federal nation like ours, matters which under the constitutional system are appropriate for state action shall be brought to the notice of the proper state authorities with a favorable recommendation from the federal government. Until the state government acts on such a recommendation, the Covenant will not impair existing or subsequent state laws.

The area of federal law, however, needs serious consideration. Here we must distinguish between Acts of Congress before the ratification of the Covenant and those after such ratification. A subsequent federal statute which violates an article of the Covenant will be a breach of our international obligation, but it will be valid. The Supreme Court has frequently held that an Act of Congress is the law of the land even though it is inconsistent with an earlier treaty.[44]

What concerns us, then, is the effect of the Covenant on earlier federal statutes. Here again the later legal action prevails. In the event of inconsistency, the treaty is the law of the land and supersedes the earlier statutes.

Little confusion is caused by this doctrine when a treaty relates to a few clearly defined areas of domestic law. Then, a government official or a lawyer can tell pretty well what domestic statutes have been superseded by the treaty in question.

[43] 2 Pet. at 314.

[44] See 5 GREEN H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 185-198 (1940).

The situation will be altogether different with respect to the Covenant, if it be self-executing. Its provisions are so numerous and so broad that they may apply very unexpectedly in all sorts of places. Furthermore, it is often difficult to say whether a particular federal statute is inconsistent with an article of the Covenant or not. For instance, several persons have thought that Article 17 as drafted by the Sub-Commission and the Geneva Conference is inconsistent with the present statutory power of the Securities and Exchange Commission to prohibit a prospectus which has not been approved by the SEC. My own opinion is to the contrary, but it would be very undesirable to leave this question in long uncertainty until it was settled by the Supreme Court.

If the Covenant is to be self-executing, an enormous and painstaking examination of the whole United States Code would be necessary. The situation would be something like that presented by the proposed Equal Rights Amendment to the Constitution. If women are to be guaranteed exactly the same rights as men, no more and no less, it is very hard to say how many existing laws will be changed and to what extent. For instance, if a statute allows boys to marry at 18 and girls at 16, which age applies to both under the Amendment? Will the crime of rape be abolished since it is applicable to one sex of offenders? The undesirable consequences of giving an unexpected and sweeping effect to international transactions in relation to domestic law is pointed out by Manley O. Hudson in his note on "Integrity of International Instruments."[45]

Another consequence of a self-executing Covenant is that our government will naturally try to qualify many articles of the Covenant, in order to prevent their automatic operation from invalidating federal statutes which are considered to be very desirable. Thus the Covenant will be unduly lengthened because of the special situation of the United States.

In as much as the Covenant will not be self-executing in the United Kingdom and the British Commonwealth, it seems fair to place the United States on the same level as these other countries.[46] If our government insists on appropriate language to prevent the Covenant from becoming self-executing, no legitimate objection to this clause can be made by the other parties to the Covenant.

D. Methods of Preventing the Covenant from Being Self-Executing

It was by no means clear that Article 2, as it was drafted in December, 1947 and already quoted,[47] avoided the danger of being self-executing. The writer was inclined to think that the Supreme Court would construe it as merely pledging the good faith of the United States that Congress would repeal or amend any statutes inconsistent with the Covenant. Yet many persons took the opposite view. Any doubts on such an important matter were regrettable. Fortunately the State De-

[45] 42 AM. J. INT'L L. 105 (1948).

[46] As to the situation in other parts of the world, see Wright, *The Legal Nature of Treaties*, 10 AM. J. INT'L L. 706 (1916).

[47] See note 33 *supra*.

partment and the Human Rights Commission have grappled vigorously with this problem. Before presenting their later modifications of Article 2, the writer ventures a few observations on methods of preventing a treaty from automatically becoming domestic law, where such a result is undesirable.

Many American treaties have not made it plain whether they are self-executing or not. The decision may then somewhat depend upon the nature of the treaty. A treaty for the payment of money has been mentioned as not self-executing.[48] Justice Curtis in 1855 thought that a treaty relating to tariff duties was merely a contract to legislate.[49] On the other hand, material collected by Hackworth shows that the Department of State has recently regarded the most-favored-nation clause in provisions of commercial treaties as effective without the subsequent enactment of congressional legislation.[50] In the Florida land grant case, the fact that Congress had acted to implement the treaty with Spain made it easier for Chief Justice Marshall to declare that the clause about land titles was not self-executing.[51] A decision by Judge Parker in 1929 holds that treaties about patents are not self-executing.[52] The complexity of the patent law and the administrative machinery is said to call for congressional action. But the authority of this decision is somewhat shaken by the *Bacardi* case in the Supreme Court,[53] which holds that a trademark treaty is self-executing. Probably the two cases can be distinguished, but it is evident that one cannot rely on the subject-matter of a treaty as determinative of the question of its self-executing character. Furthermore, when we come to the Covenant on Human Rights, its extensive concern with domestic rights and duties would seem to make it *prima facie* self-executing in the United States so far as subject-matter goes.

Consequently, plain language will be necessary to prevent this undesirable result. Such language might be inserted in the Covenant itself or in our ratification of the Covenant. If it were in the ratification it would be a sort of reservation and it would require the consent of the other parties to the Covenant. Some such procedure has been followed at times,[54] but would be objectionable in this instance. Therefore it would seem that the Covenant itself should contain the necessary language to prevent it from being self-executing in the United States.

The most useful discussion of this problem is in an article by Edwin D. Dickinson, "Are the Liquor Treaties Self-Executing?"[55] He says:

> Treaties not infrequently stipulate in terms that they shall be put into effect by legislative enactment. . . . Whatever the reason for proceeding by this avenue may be, if the treaty by its terms requires legislative action to make it effective, the result is clear. The treaty is not self-executing.

[48] See note 41 *supra.*

[49] Taylor v. Morton, 23 Fed. Cas. 784, No. 13,799 (C. C. Mass. 1855).

[50] HACKWORTH, *op. cit. supra,* note 44, at 179-183.

[51] See note 42 *supra.*

[52] Robertson v. General Electric Co., 32 F. 2d 495 (C. C. A. 4th 1929), *cert. denied,* 280 U. S. 571 (1929). See 29 MICH. L. REV. 630 (1930).

[53] See note 38 *supra.*

[54] See the case of the Cuban Convention in HACKWORTH, *op. cit. supra,* note 44, at 203-204.

[55] 20 AM. J. INT'L L. 444, 448 (1926).

Dickinson lists four American treaties containing such express language.[56] One is an old treaty with Russia in 1824.[57] The Multipartite Convention of 1884 for the Protection of Submarine Cables said:[58]

> Article XII. The High Contracting Parties engage to take or to propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment, either by fine or imprisonment, or both, of such persons as may violate the provisions of articles II., V. and VI.
>
> Article XIII. The High Contracting Parties shall communicate to each other such laws as may already have been or as may hereafter be enacted in their respective countries, relative to the subject of the Convention.

The fur seal treaty of 1911 with Great Britain, Japan, and Russia, declared:[59]

> Each of the High Contracting Parties agrees to enact and enforce such legislation as may be necessary to make effective the foregoing provisions with appropriate penalties for violations thereof.

The migratory bird treaty of 1916 with Great Britain read:[60]

> The High Contracting Powers agree themselves to take, or propose to the respective appropriate law-making bodies, the necessary measures for insuring the execution of the present Convention.

Congress enacted legislation to carry out each of these treaties.[61]

Professor Hudson has called the writer's attention to the Montreal International Labor Organization Convention of October 9, 1946, and also to the Multipartite Convention on Narcotic Drugs of 1931,[62] which says in Article XV:

> The High Contracting Parties shall take all necessary legislative or other measures in order to give effect within their territories to the provisions of this Convention.

These models are available for adaptation in the Covenant, but thus far the Human Rights Commission has taken a different course in revising Article 2 since the Geneva Conference. The draft of June, 1948, contained an undertaking "that such rights and freedoms where not now provided under existing rules and procedures be given effect in its domestic law through the adoption of appropriate laws and procedures."[63] This was still further improved in June 1949. The first section of Article 2 now reads:[64]

[56] *Id.* at 448 n. 20.

[57] 2 WILLIAM M. MALLOY, TREATISES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS, AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 1512, 1513 (1910). See 4 STAT. 276 (May 19, 1828).

[58] *Id.* at 1954.

[59] 37 STAT. 1542, Art. VI (July 11, 1911).

[60] 39 STAT. 1702, Art. VIII (Aug. 16, 1916).

[61] Dickinson, *supra* note 56. *See also* Missouri v. Holland, 252 U. S. 416 (1920).

[62] 5 MANLEY O. HUDSON, INTERNATIONAL LEGISLATION 1048 (1941).

[63] REPORT OF THIRD SESSION (E/800, p. 15).

[64] REPORT OF FIFTH SESSION (E/1371, p. 28).

Each State party hereto undertakes to ensure to all individuals within its jurisdiction the rights defined in this Covenant. Where not already provided by legislative or other measures, each State undertakes, in accordance with its constitutional processes and in accordance with the provisions of this Covenant, to adopt within a reasonable time such legislative or other measures to give effect to the rights defined in this Covenant.

This seems to solve the problem. At any rate, there is no reason for hostile critics of the Covenant to assume that it will be self-executing. If this draft does not prevent that effect, some better draft can be found to do the job. With the models at hand which were lately quoted from several American treaties, it must be possible for Article 2 to make it unmistakably plain that Congress must act before existing federal law is modified to conform to the Covenant.

The Covenant will be far more successful if it operates as an international obligation of good faith than if, in addition, it serves as an uncertain and dislocating factor in federal law, upsetting nobody knows what until costly litigation comes to an end.

VI

THE STRUCTURE OF ARTICLE 17

Before the Sub-Commission had worked many hours on the text of Article 17, we found that the main provisions were arranging themselves in our minds on three levels.

First. There must be an affirmative description of freedom of thought and expression, which the signatory nations were to obligate themselves to protect as a fundamental human right. In order to avoid any loopholes, we specifically mentioned various aspects of freedom of information and various modes of communication. This affirmative provision was framed by the Sub-Commission with great care, so as to be a firm and wide statement of the freedom which underlies all the other freedoms. In as much as the problems here encountered concerned style rather than law, only one will be discussed in these pages.

Second. Article 17 would have to contain permissive limitations on this broad freedom. In some form or other, we needed to define the types of objectionable language which a nation could control if it so desired. This portion of both the Sub-Commission and Conference drafts caused the most trouble and has aroused bitter attacks. Hence the problems involved will be the chief object of attention in the rest of what the writer has to say.

Third. Since there were obvious risks that the permissive limitations might be abused by a nation so as to stifle desirable discussion, safeguards against this ought to be established. This important point will be elaborated in the course of dealing with the permissive limitations.

VII

SHOULD FREEDOM OF INFORMATION BE PROTECTED AGAINST ONLY GOVERNMENTAL INTERFERENCE?

This was the one serious legal problem which arose in the affirmative definition of the rights in Article 17. Most articles of the Covenant run against everybody. "It shall be unlawful to deprive any person of his life . . ." "No person shall be deprived of his liberty . . ." In this respect, the Covenant articles go beyond the Fourteenth Amendment, which protects human rights against only action by states, cities, etc., and their officials, and does not apply to private wrongs. For instance, it could not be used to punish the violent intimidation of Negroes by the Ku Klux Klan. Lauterpacht opposes such a distinction in the Covenant,[65] and the Human Rights Commission has been wise in abandoning it for rights like life, liberty, bodily safety, and a fair trial, which have long been protected by law against any sort of interference. It makes little difference whether this established protection is given by constitutions or by other parts of the law, such as criminal codes and the writ of habeas corpus. The point is that the Covenant does not obligate the United States or any other civilized nation to do anything novel in punishing murder or rescuing somebody from imprisonment by a gang of thugs. We do not want the nations which sign the Covenant to dodge responsibility for lynchings and other organized forms of violence, which often exist because of governmental connivance or inefficiency.

Freedom of speech, however, is in a somewhat different situation. Historically it grew up as an immunity against suppression by governments and government officials. Except in such matters as organizing labor unions, the law has done little to prevent one private person from imposing restrictions upon the utterances of another private person. Was it desirable to create an international grievance whenever a high school principal excluded a story from the students' magazine or a college professor was dismissed for heterodox ideas or a newspaper publisher refused to print an article prepared by a reporter? Serious evils are indeed created by deprivations of academic freedom and by the bias of some of the men who control newspapers, but attempts to end these evils by law are likely to put government officials in charge of private discussion. The proper remedy lies in public opinion and the development of a genuine professional spirit among all those concerned with an educational institution or a newspaper.[66]

Therefore, the Sub-Commission draft of Article 17 begins: "Every person shall have the right to freedom of thought and expression *without interference by governmental action. . .*" and the italicized words were also used in the Conference draft.

[65] Lauterpacht, *Human Rights, the Charter of the United Nations, and the International Bill of the Rights of Man*, 19-20 (REPORT OF HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASS'N, BRUSSELS CONFERENCE, 1948).

[66] See A FREE AND RESPONSIBLE PRESS (COMMISSION ON FREEDOM OF THE PRESS, 1947), *passim;* ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS cc. 23 and 24 (1947).

Their omission in the French draft now before the Human Rights Commission raises serious questions.[67]

VIII

THE NECESSITY OF SOME SORT OF LIMITATIONS

Several hostile American critics of the Sub-Commission among newspapermen have accused it of granting freedom of the press with one hand and snatching it away with the other. Thus Hugh Baille, the President of the United Press Associations, said in part of a letter about Article 17:

> It is my opinion its adoption would constitute a long step in the direction of bringing the American press under the government's thumb, in contravention of the First Amendment to the Constitution of the United States.
>
> This is the very opposite of what I had in mind when the drive for greater freedom of information throughout the world was started.
>
> I refer specifically to paragraph 2. Under subdivision (a), that penalties could be imposed upon the press for reporting "matters which must remain secret in the vital interests of the state," would not governments, with the blessing of the United Nations, be encouraged to draw up lists of classified subjects which shall be taboo in the press and to pass laws to enforce that taboo, thus bringing about a peacetime censorship?
>
> Subdivision (b) says the press could be punished for "expressions which incite persons to alter by violence the system of government." Not long ago the United Nations Assembly called on all countries to withdraw their ambassadors from Spain. This certainly could be construed as an attempt to incite the Spanish people to overthrow Franco. In that case could we be charged with violating the Covenant for reporting an action by the United Nations and distributing it to newspapers throughout the world? How about reporting the speech of a Hyde Park orator who calls for the overthrow of the monarchy in Britain?
>
> Subdivision (c) proscribes "expressions injurious to the fair conduct of legal proceedings": Judges even now try occasionally to muzzle the press by contempt proceedings against reporters or editors. Does not this provision in (c) condone such actions by judges which are resisted by the press whenever they arise, and invite an extension of censorship from the bench, sanctioned by the United Nations?

And other critics cried out, why not merely define the right and stop as the First Amendment does—

> Congress shall pass no law abridging the freedom of speech, or of the press.

It does not bristle with limitations like Article 17.

It is true that the First Amendment does not mention any limitations, but they are there just the same. Newspapers can be made to pay for libels, sellers of obscene books can be punished, and men can be punished for improperly discussing pending court cases. The framers of the First Amendment and the corresponding provisions in state constitutions did not spell out such exceptions. They took them for granted because they were part of their legal background in familiar principles of our judge-made law and occasionally in legislation. Moreover, the First Amendment is con-

[67] See the three drafts in Appendix II.

strued by the Supreme Court in relation to the original Constitution, and limitations are read into it from the affirmative powers of Congress. Consequently, Eugene Debs was imprisoned for what he said about our entering the First World War, indecent books are barred from the mails or seized by the customs, and anarchists have been deported for what they merely thought.

Now, this device of judicially implied limitations upon an apparently absolute freedom is obviously impossible for an international treaty like the Covenant. It stands by itself; if it grants complete immunity for talk and printing, there is no underlying document like our original Constitution to cut down that immunity. And the framers of Article 17 cannot take anything for granted. They cannot assume a background of familiar law, because the Covenant is intended to bind many nations, each of which has its own sort of law. Every nation which signs the Covenant ought to be told plainly how much it promises and what it does not promise. Therefore, the limitations on freedom of speech, which are understood without being mentioned in a domestic constitution, need to be spelled out carefully in a treaty provision on free speech.

Furthermore, the twelve members of the Sub-Commission were not just describing an ideal situation in Utopia. We were preparing a treaty with the hope that it would be signed and ratified by two-thirds of the states in the United Nations. Otherwise, our work would not become law. Consequently, we had to frame the kind of promises which governments could reasonably be expected to sign. If we drafted a promise which left no opening for a government to punish a person who betrayed its secret plans of forts and airplanes, there was very little prospect that our government or the British government would sign it, to say nothing of others. So it was thought essential to permit governments to retain a reasonable power of control with regard to matters where serious danger from abuses of free speech has long been recognized and where some regulation of newspapers is customary in free societies like England and the United States.

The necessity of allowing some penalities on objectionable publications is plain. Freedom of speech is not the only purpose for which a society exists. It is a tremendously important purpose, but there are other important purposes like national safety, the administration of justice, and the protection of individuals from harm. Government leaders and many patriotic citizens would be outraged if our nation were asked to sign a treaty which pledged our federal and state governments not to take any action against a treasonable newspaper or a pornographic film and never to award damages for libels. Some areas had to be blocked out within which penalties might legitimately be imposed, if Congress or the state legislatures should wish. A similar attitude naturally exists in other nations, and ought to be constantly kept in mind.

The limitations in Article 17 take care of this situation, but they impose no restrictions whatever upon the press. They are merely permissive. "Penalties . . .

may . . . be imposed" against specified types of utterances. That is all. Nothing requires a government to punish the disclosure of state secrets or violent revolutionary talk or contempt of court. Article 17 simply says that if a government does choose to punish such matters, it will not be violating the Covenant.

There is absolutely no basis for any fears that our ratification of Article 17 would supersede the First Amendment. In the first place, if they did conflict, this would merely nullify Article 17 *pro tanto* as an obligation of the United States. Although the treaty-making power does affect the balance between nation and states by allowing the President and two-thirds of the Senate to do some things which a majority of both houses of Congress cannot do, *e.g.*, entitling aliens to inherit land within a state, nevertheless a treaty cannot validly disregard an express prohibition in the Constitution, such as the First Amendment. This was the position of Chief Justice Hughes in the address previously quoted,[68] and the writer knows of no Supreme Court authority to the contrary.

Secondly, no conflict exists between the First Amendment and the Sub-Commission draft of Article 17. The same proposition holds good for the Conference draft and for any other draft that is likely to be promulgated by the United Nations. Perplexities might indeed arise if the Covenant affirmatively undertook to compel our government to punish a type of utterance which was conceivably within the constitutional protection of the First Amendment. The Soviet draft already mentioned as now before the Human Rights Commission may present this difficulty,[69] but its adoption seems very improbable in view of the steadfast and overwhelming opposition of the Sub-Commission and the Geneva Conference to similar Soviet proposals flatly denying freedom of expression to vague categories like fascism and warmongering. Instead, the policy of merely optional limitations has always prevailed. The closest approach to trouble was caused by a different article (21) which appeared in the earliest draft of the Covenant: "Any advocacy of national, racial or religious hostility that constitutes an incitement to violence shall be prohibited by the law of the State."[70] Objectionable as such forms of hostility are, this was not the right way to deal with them and it raised grave constitutional questions for the United States. Fortunately, Article 21 is shelved in the June, 1949, draft and may perhaps be much changed. Article 17, at any rate, contains nothing compulsory except the obligation to grant freedom of thought and expression. The limitations leave Congress completely free to do nothing or to deal with the specified types of speech by enacting any laws it pleases within the scope of the First Amendment and other clauses of the Constitution. The same open choice is possessed by state legislatures, in so far as the states come within the Covenant at all (in view of the

[68] See note 32 *supra*. There is no need, in this connection, to worry about problems arising if the United States were terribly defeated in a war and then forced to sign a peace treaty contrary to constitutional prohibitions.

[69] See note 10 *supra*.

[70] REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS, Dec. 17, 1947 (E/600, p. 35). Compare REPORT OF THE FIFTH SESSION (E/1371, pp. 39-40).

article on federal nations). It is also noteworthy that all the limitations in Article 17, with the possible exception of (h) in the Conference draft—the Indian amendment hereafter discussed—correspond with the types of objectionable utterances which the Supreme Court allows to be controlled under the First and Fourteenth Amendments. In short, Article 17 merely qualifies the broad promise to guarantee freedom of information by authorizing each signatory nation to have, if it wishes, certain kinds of suppressive laws in accordance with its own constitutional system.

IX

ONE BLANKET LIMITATION OR SEVERAL SPECIFIC LIMITATIONS?

This is the most complex and baffling of all the legal problems raised by Article 17. The method of specific limitations was chosen by both the Sub-Commission and the Geneva Conference (see Appendix II, Drafts A and B). The United States government, however, has always urged a single blanket limitation to the effect that

> freedom of expression may be limited only to protect the rights of others and the freedom, welfare, and security of all.[71]

This resulted from the attitude of our government toward the Covenant as a whole. During the preparation of the original draft of the Covenant by the Human Rights Commission in December 1947, the United States wished to have no limitations at all in the articles defining the various substantive rights, but to deal with this essential matter by an overall article resembling in a general way the language just quoted.[72] That was the plan followed in the Declaration of Human Rights.[73] After the Commission had decided otherwise as to the Covenant and inserted specific limitations in many articles, our government thought that it would still be desirable to use the idea of a blanket limitation in Article 17.

When this idea was suggested to the Sub-Commission, it took about ten seconds to show that nobody wanted it. In Geneva, the blanket limitation was thoroughly discussed and repeatedly voted down by irresistible majorities. Since the French draft now before the Human Rights Commission (Appendix II, Draft C) resembles the American proposal, the controversy will probably be renewed at its sixth session in 1950.

The main reason why the blanket limitation was rejected by the Sub-Commission and the Conference was because it makes nearly meaningless the affirmative right in the first paragraph of Article 17. Such terms as the "welfare and security of all" could be used to justify almost any restriction on freedom of expression which any official or legislature would be likely to want to impose. The most ardent advocates of suppression, like Pobedonotsev in Czarist Russia or the Lusk Com-

[71] REPORT OF THE UNITED STATES DELEGATION, *op. cit. supra* note 7, at 6-8. This states the position of the Delegation and the writer's minority views.

[72] E/600, p. 38; see Appendix I of the present article.

[73] The overall article in the Declaration is 29(2).

mittee in New York or the present Un-American Committee, always sincerely believe that drastic penal laws and censorship are necessary to preserve national security and promote the general welfare by heading off revolutions, social demoralization, and other calamities.

In view of the omission in the Conference draft of the prohibition of peace-time censorship, framed by the Sub-Commission, the substitution of the blanket limitation for the present second paragraph of Article 17 would give a very wide scope for restraints on freedom of speech. It is bad enough to have criminal laws directed against many types of supposed objectionable utterances, but it is far worse when a rigid censorship can be established to revise or forbid publications for any cause which is related to the "welfare and security of all."

If that sort of thing can be done without any violation of Article 17, then the obligation which the signatory nations assume to maintain freedom of thought and expression fails to operate in the very situations where toleration is needed.

Nevertheless, there is a good deal to be said on the other side. The case for the blanket limitation is forcefully presented by Herzel H. E. Plaine of the Department of Justice:[74]

> This idea would permit of a style of drafting of a single limitation summarizing the right of government to deal fairly and reasonably in limiting the rights set forth, but pursuant only to law and subject at all times to conformity with the article on equal protection of the law [Article 20].
>
> In the view of the other school of thought, this was much too broad. [Specific limitations were urged instead.] Viewed abstractly the theory of specific limitations offers persuasive inducements. Why should not government claim now, and for all time, the legitimate, specific bases upon which it may deal with and restrict individual liberties, but only these and no more?
>
> However, as the study of the sources and causes of legislative action progressed and the realization dawned upon many of the delegates that in one way or another all of these sources and causes infringe upon and subtract from the unfettered freedoms of man, it became clearer that there was a good deal of illusion in any attempt to be specific in dealing with the breadth and depth of reserved legislative power. The so-called specific limitations which were evolved, either *in toto* or individually, were no more specific than the proposed single limitation clause. . .[75]

[74] *Forum on Draft Declaration and Covenant of United Nations Human Rights Commission,* in PROCEEDINGS OF THE A. B. A. SECTION OF INTERNATIONAL AND COMPARATIVE LAW 24 (Seattle, Sept. 6-7, 1948). Mr. Plaine is the Adviser from the Department of Justice to the United State Delegation to ECOSOC and the Human Rights Commission, and held a similar position at the Geneva Conference.

[75] Mr. Plaine illustrates this statement by Article 16 on freedom of religion, which allows "such limitations as are prescribed by law and are necessary to protect public order and health, morals and the fundamental rights and freedoms of others." But this is really a blanket limitation, similar to what our government wants in Article 17. Hence this example gives little support to Mr. Plaine's objections against specific limitations.

A better argument for Mr. Plaine's position can be based on Article 16. If a blanket limitation was adopted for freedom of religion, why won't it work for freedom of speech too, in Article 17? The best reply is, that freedom of religion has strong and widespread support in free nations, and the limitations on it have caused trouble very rarely in law. Polygamy and the worship of poisonous snakes do not require detailed attention in the Covenant. By contrast, the limitations on freedom of speech need to be carefully blocked out, because the public at large is constantly concerned with the dangers from

Other articles like that on freedom of expression present the spectacle of attempting to saddle a minimum of twenty-two broad areas of limitation upon the the individual's right to freedom of expression. And the enumeration is not yet complete.

The last paragraph of this quotation brings out the most serious difficulty with specific limitations in Article 17. At the Geneva Conference it became evident that the seven clauses framed by the Sub-Commission did not exhaust the possibilities of legitimate state control over speech. There are a good many other types of utterances which the governments of free countries are accustomed to suppress or regulate. These omitted situations tend to proliferate, and the list of possible additional limitations has now reached twenty-five.[76] This includes the disclosures of professional secrets contrary to law; fraudulent expressions; proper conduct of election campaigns, *e.g.*, the Hatch Act; profanity in public places; licensing of radio stations; and regulation of prospectuses of corporate securities, *e.g.*, by the SEC. And future deliberations or new inventions may turn up more items still.

Practically everybody agrees that the Covenant ought to permit laws on many of these matters, but the question remains—how can this best be done? To put them in the form of new specific limitations, besides the seven or eight already drafted, would make the tail wag the dog and render Article 17 absurdly long.

Another solution is to draft a "basket clause," which will take care of a large variety of situations ordinarily considered to fall outside the protection of constitutional guaranties of free speech. The express limitations could then be confined to the types of objectionable utterances which cause the most trouble, as in the Sub-Commission and Conference drafts. Article 8 on compulsory labor does something of the sort in its final paragraph permitting "minor communal services considered as normal civic obligations incumbent upon the members of the community. . . ." Yet when attempts were made at Geneva to produce a basket clause, it always turned out to resemble the United States proposal for a blanket limitation and aroused similar objections.

A third solution would be to list the main limitations, as now, and then require each nation to report to the Secretariat any old or new laws in other categories. Since these laws would always be within the spirit of Article 17, nobody would object to them. When, however, protests were made, they could be the subject of diplomatic negotiations, and consideration by the Sub-Commission or other appropriate agency of the United Nations.

No satisfactory solution has yet been reached, but the writer believes that one can be worked out.

In this connection, it is particularly important that the Covenant should not be self-executing in the United States, for then much less trouble will be caused by

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publications, etc., and liable to forget in times of excitement the very great value of preserving open discussion.

[76] REPORT OF FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, pp. 36-38).

desirable existing statutes which fall outside the specific limitations in Article 17 or other articles. Suppose that such a statute does technically interfere with freedom of expression. It will not be automatically nullified by the Covenant, but Congress can decide whether international good faith requires the modification of this statute. If Congress fails to change a law which other signatory nations consider objectionable, then those countries may remonstrate with us and Congress can give the matter further consideration. Something of this sort will inevitably happen in the United Kingdom and other countries where treaties are not self-executing and it is only right that the United States should be on the same level.

This whole problem is aggravated by the decision of the Human Rights Commission to postpone provisions for the implementation of the Covenant until the substantive rights were defined. Here is a striking illustration of the validity of Lauterpacht's criticism of that policy:[77]

> These two questions [of the substance of the Bill of Rights and its enforcement] are interconnected. For the enforceability of the Bill must depend on the kind of human interests which it is to protect. On the other hand, the nature and scope of the rights which we include in it must be determined by the degree of enforcement which we decide to adopt in order to make it a reality.

The present situation is as if men had to draft a criminal law without knowing that there would be any criminal courts or sheriffs. In planning several parts of Article 17, one's choice of words would be greatly helped if he knew whether these words were to be interpreted by some UN court or agency, or only by the nation obligated. This is especially true of the controversy now under consideration—

"Where ignorant armies clash by night."

For instance, one of the best arguments for a blanket limitation is that it could receive a definite content from a series of judicial decisions, just as the exceptions to the First Amendment have been blocked out by our Supreme Court. But this argument assumes that such a UN court (or other agency) will have power to construe Article 17. This is a delicate contention for the United States to make, in view of the rigid opposition of the American Bar Association to an International Court of Human Rights or to any UN agency with power to investigate violations of the Covenant except the International Court of Justice at the Hague.[78] The Hague Court would hardly have many cases under Article 17, and so the meaning of a blanket limitation would remain obscure for years.

The persistent refusal of our government to accept as a *fait accompli* the overwhelming decisions of the Sub-Commission and the Conference against a blanket limitation in Article 17 may win an improbable success in the end, but meanwhile

[77] LAUTERPACHT, *op. cit. supra* note 65, at 11.

[78] 73 A. B. A. REP. 360, 422-428 (1948). REPORT TO [A.B.A.] SECTION OF INTERNATIONAL AND COMPARATIVE LAW BY COMMITTEE ON UNITED NATIONS 2, 8. (Sept. 5, 1949.)

our opposition to every sort of specific limitations puts us in a weak position to influence the content of any particular specific limitation. The man who declares that he will never eat shellfish does not have much say as to how the lobsters shall be cooked. Two excellent opportunities to get rid of the Indian amendment, at Geneva and subsequently, were lost because our government was unwilling, in return, to abandon its die-hard stand for a blanket limitation.

X

SHOULD THE SPECIFIC LIMITATIONS BE PHRASED BROADLY OR NARROWLY?

As soon as the Sub-Commission decided to insert specific limitations in Article 17, we were confronted with a dilemma.

On the one hand, if we drew these limitations broadly, we might enable some tyrannical government of a signatory nation to punish desirable discussion without any possibility of being called to account for violating international obligations. There would be much less scope for interference with the press than under the blanket limitation already described, but still considerable abuses of governmental power might conceivably occur unless we demarcated the boundary of each limitation with precision so as to make it coincide exactly with the correct line between suppression and proper laws against speech.

The risk of abuses was especially serious in the first two limitations. The permission to control the disclosure of vital state secrets might be used by arbitrary officials to prevent newspapers from telling citizens what these officials were doing, and the permission to punish incitement to violent revolution could be stretched, as history shows, to embrace prosecutions for rather mild hostile criticisms of the policies and actions of the men in high places.

On the other hand, our tentative efforts to draft each limitation so as to cover desirable laws and nothing else ran us at once into great difficulties. For one thing, the precise boundary between good speech and bad speech in any area cannot be stated briefly. Courts have had to prick out the line by the process of inclusion and exclusion through a long series of decisions. To take the least controversial limitation—how could the Sub-Commission set out the whole existing law of libel and slander in one clause of one article of the Covenant on Human Rights? The danger that some legislature might repeal the defense of fair comment and thus cripple newspapers from expressing unfavorable opinions about officeholders and candidates had to be balanced against the fact that if the Sub-Commission undertook to deal with the details of defamation, it would spend the fortnight of its session on this point alone and Article 17 would read like a chapter of the *Restatement of Torts*. Remember, too, that the libel laws of over fifty countries would have to be mastered and reconciled. Even the Geneva Conference, with much more time and manpower at its disposal, shrank from such a colossal task, and referred it to a committee of jurists or an international organization.[79] All the other limitations, if narrowly

[79] See Resolution 25, FINAL ACT OF UN CONFERENCE ON FREEDOM OF INFORMATION 32-33.

phrased, would require a similar knowledge of comparative law. And even if the Sub-Commission succeeded in writing out with precision and accuracy the best existing conceptions about various restrictions on speech and press, we could not hope to allow for future developments. After all, the Covenant is intended to endure a long time. It cannot be given the exactness of an Income Tax Act for the next fiscal year.

In choosing the broad horn of the dilemma, the Sub-Commission was swayed by two further considerations, one relating to implementation and sanctions and the other to the express safeguards which we were putting into Article 17.

XI

IMPLEMENTATION AND SANCTIONS

It was important to frame the promises in Article 17 so they would not only be signed by many nations, but also kept after they were made. For that, they must be the sort of promises which a nation will be ashamed to violate. A breach of a treaty cannot be readily penalized like the breach of a private contract. Any external sanction necessitates some sort of cumbrous procedure like diplomatic representations, protests to a UN agency, a suit in an international court, economic pressures, and at the worst war. Here again the Sub-Commission was hampered by the failure of the Human Rights Commission to follow Lauterpacht's advice[80] and say how the limitations we were drawing were to be enforced. We do not yet know what implementation will be provided for the Covenant on Human Rights,[81] but, so far as Article 17 is concerned, it seems unlikely that whatever international sanctions are thus established will be very effective in checking governmental breaches of the right of freedom of expression if those breaches occur very frequently or if they are caused by a strong feeling in the particular country that the treaty obligation endangers public safety. Recall the attitude of our own Southern states toward the Fifteenth Amendment. For forty years they ignored it with impunity.

Consequently, unless Article 17 allows room for a nation to adopt reasonable restrictions against utterances of an objectionable nature, its provisions may be little more than a pious hope. In a matter like this, it is unwise to induce a government to tie its hands very tightly. The result may be simply that it will untie them at any early opportunity when other nations will not care enough to raise a peep. When Hitler moved troops into the Rhineland in 1936, he violated the German treaty of peace with the United States. Yet President Roosevelt did nothing. No politician or editor, so far as the writer recalls, suggested that our government should

[80] See note 77 *supra*.

[81] For a summary of the various implementation proposals in 1948, see Documents for Study in the 1949 Series of Regional Group Conferences of the American Bar Association, pp. 64-69. See also on implementation, REPORT OF THE SECOND SESSION OF THE COMMISSION ON HUMAN RIGHTS (E/600, pp. 65-71); REPORT OF THE THIRD SESSION (E/800, p. 36); REPORT OF THE FIFTH SESSION (E/1371, pp. 11-22, 61-100).

do anything. That was a far greater wrong than a violation of Article 17. If Ruritania, let us say, punishes an editor of a Ruritanian newspaper for suggesting that its Parliament is composed of nincompoops, will the governments of the United States, Great Britain, and France be more active than they were in 1936? The Rhineland march shows how undependable external sanctions can be.

Therefore, it is very important to place as much reliance as possible upon what Dicey calls *internal* sanctions.[82] The Sub-Commission had to draw up the kind of promise which most good citizens within a country will want to carry out because they believe it to be a fair and desirable promise. One ought to take it for granted that the states which adhere to this Covenant will be countries with a reasonable amount of democratic government and devotion to personal freedoms of all sorts. Perhaps this assumption is mistaken, but, if so, measures from outside short of war are not likely to accomplish much in upholding Article 17 or any other article in the Covenant. Many other freedoms besides freedom of the press are likely to go by the board in a totalitarian state. Twelve men at Lake Success and a piece of paper cannot do very much to prevent a strong government from breaking promises which both its officials and its people intensely dislike. In short, the whole Covenant rests largely upon willingness to obey.

XII

EXPRESS SAFEGUARDS

The internal sanctions just described are the principal safeguard against abuses of broad limitations in Articles 17, but the Sub-Commission relied greatly on two other safeguards which it expressly wrote out in the text of this article and to which it devoted much thought and care.

A. Elimination of peacetime censorship

The first safeguard was the unequivocal repudiation of censorship of the press and of newsreels in paragraph 3 of the Sub-Commission draft (see Appendix II, Draft A). Even if a publication fell under one of the specific limitations, *e.g.*, advocacy of violent revolution or crime, it could only be punished but it could not be censored. (This provision would be suspended in war or a public emergency by virtue of Article 2). Since governmental censorship is the most powerful means of controlling and stifling public opinion, as Chief Justice Hughes pointed out in *Near v. Minnesota*,[83] the Sub-Commission regarded the elimination of peacetime censorship as one of its most notable achievements. The vote was ten to two; the minority comprised the Soviet and Czech members.

To the writers's great regret, the Geneva Conference struck out this prohibition of censorship. Since this action was supported by officials in Washington, although

[82] A. V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 77-79 (8th ed. 1915).

[83] 283 U. S. 697 (1931).

not by the United States delegation at Geneva,[84] the restoration of this provision by the Human Rights Commission seems unlikely. This difference in attitude toward censorship between the Sub-Commission and the Conference was a sign of worsening international feeling after the Czech *coup d'état*. It was a conspicuous example of the tendency of the Conference, already mentioned, to plan the Covenant for the present troublous situation.[85] The partial recognition of censorship in the American Convention on the Gathering and International Transmission of News[86] was given in debate as a reason for not eliminating censorship entirely, but to the writer this argument was unsound because the Convention was intended to go into force as soon as possible whereas the Covenant ought to be designed for the better days to come.

B. The rule of law

The second safeguard valued by the Sub-Commission appears in its draft of the opening portion of paragraph 2, preceding the list of specific limitations:

> Penalties, liabilities or restrictions limiting this right may therefore be imposed *for causes which have been clearly defined by law* . . .
>
> The very important clause in italics originated with the Czech member, Sychrava, a student and associate of Masaryk.

This means that not even punishment or damages can be imposed for an utterance within a specific limitation unless the legislature of the particular country has passed a law clearly defining the wrong, or unless (as in the case of libel) the wrong has been solidly established by judicial precedents. For instance, a statute saying merely that it was a crime to disclose "matters which must remain secret in the vital interests of the state" would not comply with this safeguard. The statute must define the particular kind of state secret which it is a crime to reveal. There are now several Acts of Congress fulfilling this requirement. *A fortiori*, an official cannot justify his going after a publication by merely saying that it falls within a specific limitation. He must be able to point to a specific statute condemning such a publication.

No doubt, governments may conceivably abuse their powers under the specific limitations, but this cannot happen unless the legislature has plainly sanctioned such an abuse of power by a majority vote. Officials are prevented from running on the loose. The Sub-Commission relied on public opinion within each nation as a safeguard against misuses of the legislative power to create undesirable new kinds of criminal publications and speech within the limitations in Article 17.

Unfortunately, the Conference has seriously weakened this safeguard. In an attempt at brevity, it made the provision read *"penalties, liabilities or restrictions*

[84] In view of the attitude of the government in Washington, the United States abstained from voting on the censorship issue, but the writer spoke in Committee IV in favor of retaining paragraph 3 of the Sub-Commission draft.

[85] See page 549 *supra*.

[86] Art. 4. See FINAL ACT OF UNITED NATIONS CONFERENCE ON FREEDOM OF INFORMATION 8.

clearly defined by law . . ." It is not enough to demarcate the punishment if the wrong itself be left vague. The Conference draft would permit a statute to impose a penalty of five years for the disclosure of "any matters which ought to remain secret in the interests of national safety."

Thus there are strong reasons why the Human Rights Commission should consider this point carefully. It is to be hoped that the Commission will restore the wording used by the Sub-Commission.

As Article 17 now stands, the only assurance against abuses of the specific limitations lies in the internal sanctions described.

XIII

THE INDIAN AMENDMENT

Something might be said about the seven limitations drafted by the Sub-Commission and somewhat modified by the Conference, but these caused no serious controversy within these bodies.[87] Although they have been attacked in the American press, it can easily be demonstrated that every one of the seven substantially describes either Acts of Congress passed by heavy majorities or time-honored restrictions under state statutes and judge-made rules.

The situation is entirely different for the eighth amendment, which was added by the Geneva Conference as proposed by the delegation from India, after a more sweeping Polish proposal of the same general nature had been rejected. The Indian amendment allows a signatory state to impose penalties, liabilities, or restrictions with regard to—

(h) The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States.

John B. Whitton of Princeton, in his very interesting article on the Geneva Conference, thinks that, in opposing this amendment, the United States Delegation showed itself unhealthily allergic to legal obligations as regards propaganda. Whitton writes:[88]

This was a modest proposal; it did not purport to cover all war-mongering or subversive propaganda, but only that based on false or distorted reports . . . [Actually] the only effect of this amendment would be to add one more to the long list of restrictions

[87] The limitation as to state secrets was widely phrased by the Sub-Commission, so as to include crop reports, lists of persons on relief, and other matters not related to national safety. The Conference, by narrowing the limitation to secrets affecting national safety, increased the number of desirable laws for which there is now no provision in the specific limitations. The Conference wisely changed the copyright limitation, because France and some of her nations do not regard copyrights as property. The concluding phrase in clause (g), was inserted, at the writer's suggestion, to take care of tortious non-defamatory language, such as slander of title and disparagement of the quality of goods. See 1 ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS c. 6 (1947). The phrase is rather obscure and should perhaps be omitted; the wrongs in question could then be handled like other omitted matters of comparatively slight importance.

[88] WHITTON, *The United Nations Conference on Freedom of Information and the Movement Against International Propaganda*, 43 AM. J. INT'L L. 73, 86-87 (1949).

already accepted at the Conference by states most devoted to the right of freedom of information . . . [To] cite Professor Hocking:[89]

". . . [A] cautious extension of penal law to deal with the most flagrant abuses of public confidence would be an increase of freedom for the legitimate press. To clear the highways of drunken drivers is not to limit but to increase the liberty of drivers who are not drunken."

A limitation is not just "one more" when there is no precedent in American common law or legislation for such a restraint on the discussion of important public questions. In this and other respects, the Indian amendment is wholly unlike the seven types of familiar restrictions allowed in the Sub-Commission draft. The only thing comparable to it in the United States is a few recent statutes against defaming racial or religious groups, of doubtful constitutionality and still more questionable wisdom. Indeed, the objections to group libel laws are much the same as those against the Indian amendment. These are presented elsewhere by the writer in a book which also discusses the difficulties of a still closer proposal, that legislation should be enacted to punish all sorts of inaccurate statements in the press which have harmful consequences, for instance, to good feeling among nations.[90] Rather than repeat the arguments there made, three reasons against the Indian amendment will be briefly stated.

First, lawmakers should be very reluctant to create novel crimes in the area of speech and press when it will be hard for the jury or other tribunal to distinguish between guilt and innocence. Neither Mr. Whitton nor Mr. Hocking seems aware of the great difficulties of proof in such cases. Since the proposal says "false" reports shall be punished, it is easy to assume that true reports will be left alone, but the trouble is that there is no litmus paper or yardstick to tell what is true and what is false. We never know that a statement is really false, but only that the tribunal decides it is false. Experience with suppressive statutes like the Espionage Act shows that juries and judges sometimes call political discussions false because they dislike what is said. Yet it is really a matter of differences of opinion. Nor can you take it for granted that only sensational papers will be prosecuted. The New York Times can cause great resentment by a calm dispatch. Moreover, where international controversies are involved in the prosecuted publication, the expense of getting evidence on a large scale from abroad and the language barriers make an accurate and dispassionate determination of what really happened almost impossible. It is a task for a historian and not for a law court.

So Mr. Hocking's analogy of punishing drunken drivers is not at all in point. The line between being drunk and not being drunk is familiar to ordinary men and can be established by eye-witnesses or, if necesary, by blood tests. Contrast the case of any report in a newspaper of nation A which is unfavorable to nation B in a period of strained relations, and hence can be readily held to undermine

[89] WILLIAM E. HOCKING, FREEDOM OF THE PRESS IN AMERICA 20 (Leyden Inaugural Address, 1947).
[90] CHAFEE, *op. cit. supra* note 87, c. 5 (on group libel), c. 7 (on inaccuracies generally).

friendly relations between peoples. The only issue left is truth or falsity. Witnesses must be brought over hundreds or thousands of miles to tell about the event in question. What they say will be warped by their national prepossessions either way, and the ultimate decision comparing the report with their testimony will be warped by the national prepossessions of the court or jury.

Second, such a law is not likely to do any good to offset this danger that it will suppress desirable discussion. In arguing against the Indian amendment at Geneva, the writer tried to avoid delicate ground by devising two imaginary countries which have such a statute—Looking-glass Country and Cloud-Cuckoodom. A newspaper in Looking-glass Country prints a dispatch from its correspondent in Cloud-Cuckoodom, that this nation is preparing death-dealing bacteria for use against Looking-glass Country. The government of Cloud-Cuckoodom denounces the report as false, and invokes the law. The peoples of both nations take violent sides. If the publisher is prosecuted in Looking-glass Country, he will almost surely be acquitted. If, instead, the correspondent is unlucky enough to be caught and tried in Cloud-Cuckoodom, his condemnation is just as certain. In neither event, will the people of the other country be convinced that the verdict was correct. It will be denounced as a travesty on justice in one nation and hailed in the other nation as a conclusive demonstration of its own claims. This controversy will drag on for years, and meanwhile the relations between the two countries will be made worse, not better, by the prosecution and its outcome.

The Indians felt that such a law might be of use in India or Pakistan to restrain Mohammedan newspapers from inciting pogroms against Hindus or *vice versa,* but this view presupposes governments of great integrity unswayed by local opinion; and in any event this is too isolated a situation to justify a treaty provision authorizing such a law in countries anywhere. It would be much better to omit mentioning it in the Covenant, and then, if India or Pakistan wants this sort of statute, it could be handled under the provision for unmentioned limitations which was discussed earlier in this article.

Finally, it seems highly probable that the main effect of the Indian amendment, if promulgated, would be to serve as a talking-point for the Soviet bloc. Every time "false and distorted reports" are mentioned in a UN document, they are constantly trying to push the thing farther and farther. They denounce anything unfavorable to them as "false and distorted," and seek to solidify what ought to be heartfelt moral obligations of truthfulness and accuracy into legal obligations which other countries are excoriated for not enforcing. Put those words into the Covenant, and their chief consequence will be to multiply tedious interruptions of important concrete tasks by the U.S.S.R. and its satellites. Before doing this, the Human Rights Commission ought to find very strong possibilities of fruitful accomplishment in the

Indian amendment. In view of what has been said above, such possibilities are far from obvious.

Article 17 raises still other problems, such as the desirability of inserting moral obligations to promote freedom of information[91] into a legally binding treaty and the question of freedom of speech for foreigners in the final paragraph added at Geneva.[92]

Enough has been said, however, to show the legal difficulties encountered by the Sub-Commission and the Conference, and the thought which was devoted to their solution. There is nothing here of the glamour which is often supposed to surround international affairs. But world government, like city or state or national government, is not glamorous. It is often tedious. Only through hard work and untiring patience is it possible to turn into facts our ideals of the way men ought to live together, at home or abroad.

APPENDIX I

Tentative Drafts of Article 17 in Second Session of Commission on Human Rights, 1947[93]

Draft 1. Text proposed by the Drafting Committee.

1. Every person shall be free to express and publish his ideas orally, in writing, in the form of art or otherwise.

2. Every person shall be free to receive and disseminate information of all kinds, including facts, critical comment and ideas, by the medium of books, newspapers, oral instructions or any other lawfully operated device.

3. The freedoms of speech and information referred to in the preceding paragraphs of this Article may be subject only to necessary restrictions, penalties or liabilities with regard to: matters which must remain secret in the interests of national safety; publications intended or likely to incite persons to alter by violence the system of Government, or to promote disorder or crime; obscene publications; (publications aimed at the suppression of human rights and fundamental freedoms); publications injurious to the independence of the judiciary or the fair conduct of legal proceedings; and expressions or publications which libel or slander the reputations of other persons.

Note: Although the Report does not so state, the writer has been told that this was a British draft. Lord Dukeston (U.K.) was chairman of the Working Group on the Covenant. Without knowing the exact significance of the parentheses around "publications aimed at the suppression of human rights and fundamental freedoms," the writer assumes that the Working Group considered this limitation on freedom of information to be more dubious than the others. Light on this draft may probably be obtained from two documents which give the views of the members of the Working Group: its Report[94] and the summary records of its meetings.[95]

Draft 2. Draft Proposed by the Representative of the United States (Mrs. Roosevelt).

Every one shall have the right to freedom of information, speech and expression. Every one shall be free to hold his opinion without molestation, to receive and seek

[91] Par. 4 of Sub-Commission draft and Par. 3 of Conference draft (see Appendix II). This was proposed in the Sub-Commission by Pertinax, the member from France.

[92] For the views of the Sub-Commission and the writer on this subject, see E/CN. 4/80, pp. 5-7.

[93] E/600, Dec. 17, 1947, p. 34.

[94] E/CN. 4/56.

[95] E/CN. 4/AC. 3/1 to 9. See E/600, p. 7.

information and the opinion of others from sources wherever situated, and to disseminate opinions and information, either by word, in writing, in the press, in books or by visual, auditive or other means.

Note: The absence of limitations in this draft article is a natural consequence of the wish of the Representative of the United States for one overall limitation article rather than spelling out every possible limitation in each article.[96] This problem is discussed by the writer, *supra* pages 570-574.

APPENDIX II

Three Significant Drafts of Article 17[97]

Draft A, by the Sub-Commission on Freedom of Information and of the Press, Jan.-Feb. 1948.[98]

Draft B, by United Nations Conference on Freedom of Information, Geneva, Mar.-Apr. 1948.[99]

Draft C, submitted by the Representative of France at Fifth Session of the Commission on Human Rights, May-June 1949.[100]

Note: The author has indicated by italics portions of the Conference Draft which differ from the Sub-Commission Draft. He has italicized the entire French Draft, which differs from both the others.

A	B	C
Sub-Commission	*Geneva Conference*	*French Draft*
1. Every person shall have the right to freedom of thought and expression without interference by governmental action: this right shall include freedom to hold opinions, to seek, receive and impart information and ideas, regardless of frontiers, either orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices.	1. Every person shall have the right to freedom of thought and *the right to freedom of* expression without interference by governmental action; *these rights* shall include [rest as in A].	1. *Speech is free. Every person shall be free to express and publish his ideas in any way he chooses.* 2. *Every person shall be free to receive and disseminate information of all kinds, including facts, critical comment and ideas, by the medium of books, newspapers, oral instructions or in any other manner.*
2. The right to freedom of expression carries with it duties and responsibilities. Penalties, liabilities or re-	2. The right to freedom of expression carries with it duties and responsibilities *and may, therefore, be sub-*	3. *The freedoms referred to in the preceding paragraphs may be subject only to the restrictions, penalties*

[96] E/600, p. 37.

[97] The Conference Draft is reprinted in REPORT OF THE FIFTH SESSION OF THE COMMISSION ON HUMAN RIGHTS, June 23, 1949 (E/1371, pp. 35-36). There are a few typographical changes. Arabic numbers are not in parentheses, small letters preceding subdivisions of paragraph 2 are not italicized, and the first word of each subdivision is not capitalized. "Government" is capitalized in subdivision (b) and "states" is not capitalized in subdivision (h). In paragraph 4, "article" is capitalized. An obvious error in subdivision (b) of the Commission's version is the substitution of "invite" for "incite." In (a), the Commission mistakenly says "interest."

[98] REPORT OF THE SECOND SESSION OF THE SUB-COMMISSION, Feb. 6, 1948 (E/CN. 4/80, pp. 4-5).

[99] FINAL ACT OF THE CONFERENCE, ANNEX B, pp. 19-20.

[100] REPORT OF FIFTH SESSION OF COMMISSION, June 23, 1949 (E/1371, p. 34).

strictions limiting this right may therefore be imposed for causes which have been clearly defined by law, but only with regard to:

ject to penalties, liabilities or restrictions clearly defined by law, but only with regard to:

or liabilities provided by law for the protection of public order, national security, good morals, respect for law and the reputation or rights of other persons.

A

(a) matters which must remain secret in the vital interests of the State;
(b) expressions which incite persons to alter by violence the system of government;
(c) expressions which directly incite persons to commit criminal acts;
(d) expressions which are obscene;
(e) expressions injurious to the fair conduct of legal proceedings;
(f) expressions which infringe rights of literary and artistic property;
(g) expressions about other persons which defame their reputations or are otherwise injurious to them without benefiting the public.

Nothing in this paragraph shall prevent a State from establishing on reasonable terms a right of reply or a similar corrective remedy.

B

(*a*) Matters which must remain secret *in the interests of national safety;*
(*b*) Expressions [rest as in A];
(*c*) Expressions [rest as in A];
(*d*) Expressions [rest as in A];
(*e*) Expressions [rest as in A];
(*f*) *Infringements of literary or artistic rights;*
(g) Expressions about other persons *natural or legal* which defame [rest as in A],
(*h*) *The systematic diffusion of deliberately false or distorted reports which undermine friendly relations between peoples and States;*

A State may establish on reasonable terms a right of reply or a similar corrective remedy.

A

3. Previous censorship of written and printed matter, the radio and newsreels shall not exist.

4. Measures shall be taken to promote the freedom of information through the elimination of political, economic, technical and other obstacles which are likely to hinder the free flow of information.

[Immigration problems are covered by a Note in the Sub-Commission's Report.]

B

[*Paragraph on censorship struck out.*]

3. [Same as 4 in A].

4. *Nothing in this article shall be deemed to affect the right of any State to control the entry of persons into its territory or the period of their residence therein.*

INTERNATIONAL FREEDOM OF INFORMATION

ERWIN D. CANHAM*

At the first session of the United Nations General Assembly, the importance to the preservation of peace of the freer interchange of information was clearly recognized. Indeed, the significance of the people's sources of news was well understood by many long before that. On several occasions, the League of Nations sought to take measures to lower barriers which hampered the interchange of information. Newspapermen themselves, particularly in the western democracies, have long maintained pressure on governments to help in lowering these barriers. As early as the 1890's they began concerted international efforts to secure a more ample passage of news across boundaries.

When, early in World War II, it became clear to many that the basic conflict in the world was in reality a war of ideas, there began an intensive effort to see that after the war was over, the removal of barriers to the interchange of news should be an essential part of the peace aims. Early in 1945, before the United Nations Charter was drafted in San Francisco, the American Society of Newspaper Editors sent a committee of three around the world to investigate conditions of news-gathering and transmission and to recommend measures that could be taken.

Mr. Kent Cooper, general manager of the Associated Press, and Mr. Hugh Baillie, president of the United Press, had for many years made many practical contributions to the lowering of barriers. In the years between the wars, both organizations had contributed materially to breaking down the monopolies by which news had been cartellized in the hands of governmental news agencies. They, and alert newspapermen in many countries, joined in one way or another in the campaign to facilitate a freer flow of news. As World War II ended, there were high hopes that a lowering of news barriers might contribute measurably to popular understanding everywhere of the conditions requisite for a stable and peaceful world.

Despite all this awareness, very little actual progress has been made since the end of World War II to improve the flow of objective information to people. Indeed, there are probably more obstacles to news-gathering and transmission in mid-1949 than there were at the end of 1945, for such barriers rather accurately reflect the international climate and the state of tension between nations. The international effort—largely centered on the United Nations—to follow the victory in 1945 over nazism and fascism with a new era of free information has had certain external successes,

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but in real fact conditions have not improved. The people in many parts of the world are still not accurately or objectively informed about events, and their ignorance or delusions are a prime cause of international mistrust and instability.

Let us first examine the kind of information the people of the world are now actually getting, and then let us see what the United Nations—or anybody else—can do about it.

I

INFORMATION IN THE UNITED STATES

First, the American people. With all the deficiencies of the United States press and radio—and no candid American journalist would seek to whitewash them—the fact remains that the American people are the best-informed great people in the world, and they are better informed than they have ever been before. These are plain historical facts.

They should, of course, be much better informed than they are. But with full recognition of all shortcomings, it is nevertheless true that every twenty-four hours an enormous flow of information about the world pours into the United States, most of it is distributed to newspaper offices and radio stations, and a substantial portion is disseminated to the people. There are some newspapers and some radio stations, of course, which truncate the flow of national and international news, and give prominence largely to the sensational and bizarre.

However, there are great regional newspapers in most parts of the United States which print a very substantial file of national and world news each day. And certain metropolitan newspapers which specialize in careful and comprehensive news have circulation in all parts of the country. Nowhere in the United States is it impossible for an individual to have ready daily access to a reasonably adequate account of world happenings.

Of course, it is important for this news to reach the great masses of people, as well as the specialists or the conscientious few who go out of their way to be well informed. Probably, too, some newspapers tend to underestimate the serious interests of many of their readers. But, conversely, newspapers soon go out of business if they do not retain the vivid interest of their readers, and so the editor must make his difficult daily compromise between the important and the interesting.

At the other end of the news-scale, there are some American correspondents abroad who are not fully equipped to judge and report the enormously complicated events of the vast areas where they work. Some of them, too, are required to furnish piquant rather than significant copy. But these few are considerably outnumbered by experienced, shrewd correspondents who are fearless, acute judges of men and events, and who contribute to the steady flow of important news pouring into the United States.

There are, however, large areas of the world into which such correspondents cannot now penetrate, or from which their copy is rigorously and politically censored.

In the Soviet Union, the few correspondents permitted to remain there are rarely allowed to leave Moscow, they are not supposed to seek news from anybody except the official spokesmen, and so their opportunities to find out what is going on are gravely limited. In the satellite states of eastern Europe, conditions vary widely. In some, such as Rumania, news-gathering is extremely difficult. In others, such as Poland, few limitations are applied. In China, both nationalist and communist authorities have censored severely in recent times. Censorship is periodically applied in various Latin-American countries. There are thus immense dark areas in the world from which the flow of objective reporting is today impossible.

This is not the place for a detailed examination of the internal shortcomings of the American press. Against these limitations—which have come in for a good deal of somewhat academic criticism lately—must be set the dynamic force which has produced the American news-gathering system. In the nineteenth century virtually all American newspapers were severely biased partisan organs, and the press associations had only begun to girdle the globe. Today, news reporting in American newspapers has become relatively objective.

Anyone whose concept of the limitations of American newspapers makes him doubt this statement, is invited to examine the files of American dailies at any time in the nineteenth century, or for that matter at any previous time in the twentieth century. The news service given readers has grown steadily better.

Meantime, the American press associations have freed themselves from inhibiting relations with other national press associations—most of them formerly governmentally controlled—and do an independent job everywhere in the world that they are permitted to operate. Moreover, the three American press associations—the Associated Press, the United Press, and the International News Service—sell news to news agencies and newspapers in nearly every foreign country. They are today the chief purveyors of news in the whole world. Their relative objectivity and independence make this function immensely important. But the preeminence the American press associations enjoy has also brought problems, which will be examined in due course.

In addition, a few American newspapers—but very few—maintain their own staff of foreign correspondents. In prosperous times, the news weeklies also keep extensive staffs of correspondents abroad, and so do the radio networks. But the basic core of news reaching Americans from overseas comes through the three press associations. On the whole, as I have said, they produce a broad and balanced file of news. But, since it is an essentially commercial operation, and must be based upon popular interest, it will often have to sacrifice so-called importance to reader interest.

After all, information is of no importance or value until it has entered into the consciousness and thinking of the reader. Somehow, it must be made interesting enough to penetrate. The academic critic must not be too supercilious about reader interest, and the newspaperman must remember basic significance. Between these

two fixed points, the American citizen remains actually better informed than the citizens of most of the rest of the world, although there is still a long way to go before Americans know all they need to know to carry their burdens of world leadership.

II

INFORMATION ABROAD

The information which reaches the people of western Europe, and of the British commonwealth nations, comes next in the scale of adequacy. Indeed, the splendid newspapers of smaller countries—Switzerland, Scandinavia, the Netherlands, the commonwealth—may well convey a higher degree of information than does the American press generally. Comparisons are perhaps invidious.

Canadian newspapers are very much like their United States counterparts. In Britain, for nearly a decade, and in most continental countries, severe newsprint shortages have decimated the flow of news. Editors have managed miracles of condensation. But all the same, a great deal of essential information and discussion has inevitably failed to reach the people. Basic facts are known, but plenty of contributory factors have been passed over.

Few European countries have ever given adequate news attention to the United States. This is nearly as true of Great Britain as it is of the Latin countries. Scandinavia has done very well. The American press associations, which disseminate part of the American news reaching these areas, must bear a share of the responsibility, for they have too often merely given "what the readers want"—that imperative but not exclusive standard—and it has often included an inordinate amount of sensation and trivia.

The B.B.C. has done an excellent job of conveying dispassionate, uncolored news to the British people, especially of the United States. The British and commonwealth nations receive much of their news through Reuters, which has been organized in recent years into a newspaper-owned and managed cooperative closely modelled after the Associated Press. Its direct connection with the British government has been dissolved, and it is a dynamic and effective news-gathering network, along with Agence France-Presse. It is the only world-wide agency to compare with the American services—with the exception of the Soviet agency TASS, which is quite another story.

In France, strenuous efforts have been made to prevent the pre-war corruption of the press from returning. Numerous newspapers which were published clandestinely during the Nazi occupation have tried to convert themselves into a free and democratic press. Some of them have sought to remain independent from party affiliation. They are fighting an uphill battle.

There are so many French daily newspapers, that economic security and self-sustaining independence are difficult for any of them. Encountering steady deficits, they unavoidably seek financial support from some external source, and either politi-

cal parties or industrial influences are apt to be the available sustenance. Thus begins the downfall of a truly independent press, for partisan organs almost invariably present a highly colored account and interpretation of the news. It cannot be said that the French people are adequately informed. In Italy, and the other Mediterranean countries, the situation is much the same.

In Germany and Japan, the occupation authorities have labored to encourage and guide the emergence of an independent press. Some progress has been made. But behind the scenes lurk old, military or nationalistically minded elements, which are certain to enter the newspaper field with large financial support the moment occupation controls are lifted. The new, independent press will have to fight for its life.

In Latin America, the press generally reflects the instability and political cross-currents of the various countries. Two of the greatest newspapers in the world formerly existed in Buenos Aires. They live on in name only, sapped by the Peron regime. Despite their former strength, they proved unable to stem the tides of dictatorship. Their current coverage of the world is largely composed of what they obtain from the American agencies, modified by the political pressures of the government. Here and there in Latin America, a virile and courageous newspaper exists. Numerous Latin-American newspapers are economically prosperous, which helps them to resist political pressures. In vigor and independence, the Latin-American press is somewhere between the worst of western Europe and the best.

All the news which reaches the Russian people through their own press—and little gets to them otherwise—must rigorously toe the party line. News from abroad, especially from the United States, is utterly slanted and many important facts are suppressed. The press is a vital organ of government, and it is used tirelessly to support the communist regime. There is a deeper awareness of the central importance of information in the totalitarian countries than among the democracies. The despots have long since learned that an early step toward despotism must be the suppression of an independent press. In the other eastern European countries, as in communist China, a free press has been ruthlessly destroyed. Therefore, except as the people listen to foreign radio programs, or receive clandestine information, they are far from accurately informed of world events. However, in censorship countries, the grapevine—old as history—takes on inordinate importance. Much news passes along this traditional channel, and sometimes the people know more facts than their rulers believe they do.

From this brief and general survey of information around the world, it will be seen that only a minority of the peoples receive anything remotely resembling an accurate and adequate account of what is going on. The major deterrent, it is clear, is authoritarianism on the one hand—the intervention of government—and on the other hand various defects in the performance of the press itself. These are long-range problems, and they would be affected only indirectly by the campaigns for freedom of information which have been waged through the United Nations.

Of course, despotisms of various degrees will finally end when the people really know what is happening to them—when they learn the facts of international and sense, will ultimately bring tyranny down. And so the efforts to lower barriers will national life—and thus throw off their chains. Freer information, in the broadest ultimately produce conditions that will bring about a truly free press everywhere. However, that is a very long range view. For the moment, the freedom of information campaign inside the U. N. can only serve to reduce some of the more palpable barriers to the movements of correspondents and news. It can slowly educate governments and peoples to the real significance and essence of an independent press. It can help to arouse a more vigorous responsibility within the press itself. So, having seen what needs to be done, let us turn to the U. N. campaign itself.

III

THE GENEVA CONFERENCE

At the U. N.'s 1946 General Assembly, a resolution was adopted—introduced by Gen. Carlos P. Romulo of the Philippines—calling for an international conference on Freedom of Information. The resolution described freedom of information as "a fundamental human right and . . . the touchstone of all the freedoms to which the United Nations is consecrated." To the proposed Conference was assigned the task of formulating views "concerning the rights, obligations and practices which should be included in the concept of freedom of information." The General Assembly further defined freedom of information as implying the "right to gather, transmit and publish news anywhere and everywhere without fetters," recognizing it as "an essential factor in any serious effort to promote the peace and progress of the world."

Such a resolution could be adopted only because the same language means two—or more—different things to governments holding differing political and economic philosophies. These divergencies soon came to the surface as the U. N. proceeded to organize for the Conference on Freedom of Information. A preparatory subcommission of individual experts was set up under the Human Rights Commission, and in its midst as well as in the General Assembly, bitter debates soon began between the delegates of the Soviet Union, of the western democracies, and of various other countries whose views, while not communist or totalitarian, leaned heavily toward some forms of governmental control of the press and of news.

This sub-commission had the task of preparing for the Geneva Conference. It worked its way through a great deal of preliminary ground and the broad positions of various countries were fairly well established. Without the sub-commission, work at the Geneva Conference would have been much more protracted. As well as preparing for the Conference the sub-commission discussed various general principles without, naturally, reaching concrete decisions. The Geneva Conference itself recommended the re-establishment of the sub-commission to carry out many of

the Conference's recommendations. The sub-commission was newly established in May, 1949 and has held one three weeks' session. Its terms of reference are to report to the membership of the United Nations—and hence to the public of the world—existing information practices, and to point out ways of improving them. It intends to carry out studies of the adequacy of the news at present available to the peoples of the world, censorship restrictions on movements of press personnel and information within countries and across borders, and other obstacles to the free flow of news.

At the re-constituted committee's first meeting in 1949 it was again clear that the communist members would seek to use it as a means of discrediting the information systems of the free world and convincing people that iron-handed controls by government were necessary. The Russian and Yugoslav members unsuccessfully sought to launch the sub-commission on an immediate study of the means of "spreading true information to counteract Nazi, Fascist, and other propaganda of aggression or of racial, national, and religious discrimination." The great majority of the sub-commission spurned this effort to lay the groundwork for controls and has set out upon the task of studying present and future information problems.

Andrei Vishinsky's most violent attacks upon the United States often centered on the American press, which he accused of being a venal capitalist tool of fascism. Soon a communist line of criticism of the American and British press was developed and hardened, and continued to be invoked whenever the subject came up, to the moment this article is written. Doubtless it will continue to be used until world conditions change materially. This case is basically a defense of the controlled press of the communist states, which is claimed to be the only "anti-fascist" press in the world, coupled with bitter all-out attacks on the western press as war-mongers.

The various criticisms of American and British newspapers which have been evolved mostly out of the healthy self-analysis which is the strength of our free system, have been invoked by the communist spokesmen. The report of the Hutchins Commission, the books of Morris Ernst and the Nieman Foundation—indeed, every work which ventures to point out some of the unfinished business of the American press—is used as grist to the mill. The American and British press are declared to be monopolistic—as if the existence of some 1,700 independent dailies in the United States and three vigorously competing world-wide press associations was a monopoly that compares to the iron-clad control by government of the Soviet press.

For a time, these communist arguments made a certain impression both in the West and among the in-between countries, for they coincided with the genuine self-criticism of the press prevalent in free societies, and they fitted the resentments of the have-not countries against the great, world-girdling press associations and newspapers. The arguments were unfolded in the General Assembly, and in the preparatory sub-commission. Though the United States and British delegates tried

to make clear that the so-called "war-mongering" resolution presented by communist delegates was merely a blind in defense of a controlled press, it was impossible to defeat the resolution at the Assembly of 1947. The tide seemed to be running against the western concept of an independent press. Therefore, the American delegation went to the conference on Freedom of Information, held in Geneva in March-April 1948, with meagre expectations.

We found at that Conference, however, that the brutality with which the communists had just taken over Czechoslovakia, plus the beginning impact of the Marshall Plan, were beginning to blow away some of the delusions of the in-between states. It was not inordinately difficult to work out three conventions and forty-three resolutions—by large majorities—which were with one single exception adequately reflective of democratic experience in the field of free information. At Geneva, there were many professional newspapermen among the delegates. They understood from practical experience the importance of protecting the press from governmental controls, however artfully disguised. They brought great influence to bear on their own governmental delegates, who otherwise might not have been so clear.

So the outcome of the Geneva Conference was excellent. The first convention, on the Gathering and International Transmission of News, was a simple and straightforward undertaking, originally drafted by the United States. It limited itself to helping the job of the foreign correspondent: a tangible and practical objective.

The convention called upon contracting states to encourage the freest possible movement of foreign correspondents in entering or leaving their countries, to give the widest possible access to news sources, to permit egress of copy without censorship, editing, or delay except in matters "relating directly to the maintenance of national military security" and then under specific conditions to protect correspondents against unlawful or arbitrary expulsion, and otherwise in general to assist the daily operations of correspondents and information agencies.

A second convention, on an International Right of Correction, was introduced by the French. Originally, the French would have preferred to make this convention compulsory, requiring any newspaper anywhere to print a correction upon demand of some government which believed itself misrepresented. Also, the French wished to propose an international identity card without which foreign correspondents would not have functioned freely, and a Court of Honor which would have disciplined their transgressions. It was pointed out to the French delegation that the identity card might come to be nothing less than a license to be a journalist. Establishment of the licensing power over the free expression or transmission of ideas is the very antithesis of freedom of information. And it was objected that the Court of Honor might be seriously abused.

Recognizing that the English-speaking and Scandinavian delegations felt very strongly on these points—as did a few Latin Americans and some others, like the

Philippines—the French gracefully withdrew their more extreme concepts, but stuck to the convention on Right of Correction. As worked out, this convention was not compulsory, and held promise of affording some redress to governments which might have been misrepresented. It was adopted with little opposition.

Somewhat surprisingly, the British delegation introduced a third convention, on Freedom of Information, which laid down general principles in so broad and sweeping a manner as to give the United States, some commonwealth nations, and the Scandinavian and Netherlands delegations, very considerable disquiet.

To many, the British convention seemed contrary to usual Anglo-Saxon pragmatism. The first article, for example, called upon a contracting state to "secure to all its own nationals and to the nationals of every other Contracting State lawfully within its territory freedom to impart and receive information and opinions, orally, by written or printed matter, in the form of art, or by legally operated visual or auditory devices without governmental interference."

It was not with the purpose of this clause, or of the convention as a whole, that the United States felt disturbed. It was the precise legal effect. I leave to the legal readers of this quarterly an interpretation of the effect of the foregoing clause upon many American statutes—national, state, or local. Remembering that a treaty becomes law of the land, and that conflict with any other law can only be determined in the courts, it seemed impossible to the American delegation to discover in advance what laws might be nullified by the provision. For example, would the F.C.C. statute—by which the federal government consciously discriminates in the allocation of radio frequencies—stand up under such a treaty obligation?

Or what about the F.C.C. in view of the next clause in the proposed treaty: "No contracting state shall regulate or control the use or availability of any of the means of communication referred to in the preceding paragraph, in any manner discriminating against any of its own nationals or of the nationals of any other Contracting State on political or personal grounds or on the basis of race, sex, language or religion." Here, emphatically, it seemed as if the F.C.C. statute and some others might well be nullified.

That was not all. In Article 2, the convention declared that the freedoms referred to above "carry with them duties and responsibilities and may therefore be subject to necessary penalties, liabilities and restrictions clearly defined by law, but only with regard to . . . ." Whereupon the convention listed ten areas in which limitations might be imposed.

This limitation clause did not aid the United States in preventing the nullification of useful and innocent statutes like the F.C.C. But it did open wide areas of possible abuse. Some of the limitation clauses were familiar and necessary, such as "expressions which incite persons to commit criminal acts." Paragraph (j) added to the specifications under which freedoms might be limited the following ground: "the systematic diffusion of deliberately false or distorted reports which undermine

friendly relations between peoples or States." If freedom of information may be limited on that ground, then the door is wide open to censorship of any sort.

The American delegation felt that to spell out specific grounds on which freedom might be limited—as in these ten areas—was to invite the formulation of controls. Such a list, moreover, might not include the very basis on which some government, for the best and most freedom-loving of reasons, might have to impose certain controls—such as the F.C.C., or that part of the Securities Exchange Act which "censors" the contents of stock prospectuses, or municipal ordinances which prohibit sky-writing in the vicinity of air fields. The American delegation therefore proposed a general limitation clause which would meet any legitimate situation, but would not run into the hazards of inviting controls on the basis of "false or distorted reports." That phrase—which comes straight from Soviet propaganda against the "war-mongering western press"—embodies the starkest concept of controlled and penalized newspapers and a totalitarian system.

But the American delegation was quite unable to persuade a majority of others to support a general limitations clause, or even to see the particular legal difficulties which Article 1 would create in the United States. The convention, bristling with these unsolved problems, was adopted by the Geneva Conference. To some of the troubles, there were legal remedies. For example, a so-called "non-self-executing clause" was subsequently drafted and proposed at the Third Assembly. It met with some questions and more incomprehension, but has not been acted on finally. If included in the treaty, it would avoid the conflicts with American legislation. It would not have removed the possibilities of abuse of the various specific limitations on freedom of information in Article 2.

Despite the shortcomings of the British convention, the general outcome of the Geneva Conference was encouraging to those who had been foremost in the crusade for freer information channels. It had revealed a notable waning in Soviet capacity to bemuse the middle nations with fine but ambiguous words. The iron core of communist press policy was now apparent. The aggressive line taken by the American delegation against totalitarian controls had been successful.

IV

THE THIRD ASSEMBLY

But the Geneva Conference was only an opening skirmish. A few months later, also at Geneva, the Human Rights Commission of the Economic and Social Council met to go over the three conventions and the forty-three resolutions adopted by the Conference before they were submitted to the Third Assembly, due to meet in Paris in September, 1948. At the Human Rights Commission meeting, the American delegation ran into rude surprises. First, the Soviet delegation staged a virtual filibuster for three weeks, attacking the American convention, and preventing any work on any of the others. In one respect, the American convention was almost

fatally wounded. The crucial clause on censorship, which had forbidden peace-time censorship except for reasons of national military security, was rendered a potent instrument of repression by simply deleting the word "military." The phrase "national security" would of course permit a government to impose censorship any time it chose. This was done by a vote of eight to seven, with several delegations which should have known better—notably France and Australia—voting for the dangerous language.

The three conventions were expected to be discussed at the Paris meeting of the Third Assembly in September-December, 1948, but the pressure of other work kept them from consideration. They were deferred until the meeting of the second session of the Third Assembly, at New York in April-May, 1949.

Here, almost as soon as the Assembly's Third Committee on Social and Humanitarian Affairs began its work, it was seen that the climate had changed again. Many countries which, at Geneva, had been guided by expert newspaper specialists on their delegations, were now back in the sphere of professional diplomacy. In the year that had elapsed since the Geneva Conference, the Foreign Offices, the Home Offices, the Colonial Offices—and many others—had been studying the texts.

The natural desire of government to cling to power had greatly moderated the sympathy with freedom which had prevailed at Geneva. Little changes of language, "safeguarding" clauses, and amendments of ingenious import had been concocted. Had one tenth of the amendments proposed at Lake Success been inserted into the American convention—which henceforth was called the first convention—it would have been converted into a dangerous mechanism of press control, instead of a charter of liberties.

Wide chasms of misunderstanding opened between the small group of nations which have had experience of genuine press freedom, and those which lean toward controls. Two big groups of nations—the Latin Americans and the Arabs—had a very serious "have-not" attitude toward the American press associations and the United States press in general. The Arabs, in particular, were imbued with a deep bitterness resulting from the Palestine dispute, in which they felt the American press had not fairly stated their case.

The first challenge which the first convention met at the General Assembly was as unexpected as it was serious. The Chinese delegation, supported by numerous others, proposed to change the definition of correspondent so as to exclude nationals who work in their own country in the employ of a foreign newspaper or news agency. This would have meant that a substantial number of the individuals now gathering and disseminating news for international consumption throughout the world would have been deprived of the advantages and guarantees of the treaty. Its value would have been cut by 50 per cent.

The reasoning behind this damaging proposal was complex and revealing. For the Chinese, the concept of one of their own countrymen enjoying a special status

in his own country under a treaty—almost extraterritoriality—was abhorrent. For many nations, the idea of giving their own nationals some kind of special protection —through the intervention of a foreign agency or foreign government—was undesirable. There was no intention, of course, of coming between a national and his own government by treaty and by foreign intervention. All that the convention sought to protect was the function of international news-gathering. The national as a foreign correspondent, not as a private individual, was to have specified and limited privileges.

Without such protection, the convention would have been virtually valueless in many countries. In the Netherlands, for example, nearly all the journalists providing news for foreign consumption are themselves Netherlanders. To exempt them from the treaty would have been a total surrender. Only by the scantiest of majorities was the original definition of correspondent—in effect one who sends news abroad—retained in the treaty. In the end, it became necessary to include a more complicated explanation in the convention, under which it was made clear that the treaty did not establish any power to come between a government and one of its own citizens.

This was only the beginning of the technical difficulties. The second Geneva convention—on an international right of correction—was incorporated with the first, or American, convention by agreement of the French delegation, which sponsored it, and other primarily interested delegations.

This right of correction, as drafted at Geneva and as ultimately agreed upon at Lake Success, gives a government the right to submit to another government its correction of an allegedly incorrect dispatch originating in its territories and published in the territories of the second country. The second government is then required to release the correction to the press through its customary channels. If it fails to do so, the release is made through the channels of the United Nations.

No compulsion is involved at any point to require a newspaper or news agency to publish or distribute such a correction. Were compulsion involved, the device could be made the means of forcing propaganda into the columns of newspapers, and would be very dangerous.

There was some sentiment in favor of compulsory correction among the delegations of several smaller countries. Their interest was apparent. It would have offered them a potent opportunity to force their viewpoints into the vast American press. A compulsory right of correction would have been a one-way street, running against the United States.

Suppose such a treaty obligation had existed prior to World War II, and Germany had been a party to the treaty. It would have been the professional duty of American correspondents in Berlin to send factual dispatches revealing the rearmament plans of the Nazi government or its ruthless persecutions. Yet that government would have been able to contend that these dispatches were "false or distorted," and

by unilateral fiat might have forced its replies into the columns of the American press wherever the original dispatches had been printed.

Using such arguments, it was possible to keep a compulsory right of correction out of the treaty. The correction process, as adopted, is in accord with the best practices of responsible journalism. Newspapers and news agencies are customarily entirely willing to publish corrections when they have been proved genuine. But it took long and ardent discussions and negotiations at Lake Success to keep compulsion out of the treaty.

Another crucial point concerned the basis for censorship. In the original Geneva draft, as we have seen, peacetime censorship was permitted only on grounds of national military security. At the Human Rights Commission meeting in Geneva, by deleting the word "military," the door was open for censorship at the whim of any government. At Lake Success it was even proposed to add the words "national prestige and dignity" to the grounds on which censorship might be imposed in peacetime. These words would have compounded the abusive possibilities. Only after extremely careful negotations were they kept out of this context.

It was also proposed to lay down—without defining the means of enforcement —a so-called duty of newspapers and information agencies "to report facts without discrimination and in their proper context and to promote respect for human rights and fundamental freedoms . . ." etc. It was proposed, in short, to add to the operating clauses of the treaty, the kind of language which had originated in the Russians' war-mongering resolutions. As operational obligations, these clauses would have given governments the grounds for imposing various restrictions and penalties upon correspondents or agencies, on the mere assertion of non-fulfillment or violation. Such a result would have ruined the treaty. After long negotiations, this language was all placed in preambulary context, where it refers to professional ethics rather than to legal obligations.

None of these dangerous proposals were advanced by the Soviet government or its satellites. The amendments these delegations advanced were the same old proposals to give governments power to require "truthful news" and were transparent devices for totalitarian control. They were readily defeated.

The dangerous proposals came from nations like Mexico, nationalist China, or India with which it should have been possible—and usually was—for the United States and its like-minded associates to agree; and after much mutual explanation, it was possible for agreed texts to be reached. But these texts were attainable only after a vigorous press campaign in the United States, and intensive discussion at Lake Success. The necessity for such discussions revealed the existence of a wide breach between the concept of freedom of information in eight or ten countries, like the United States, Britain, Scandinavia, the Netherlands, and the commonwealth, on the one hand, and that in much of the rest of the world on the other. Many governments, which maintain the most impeccable principles of freedom in their consti-

tutions and their oratory, actually impose various forms of control over the press, and would have written these proposed controls into the treaties. But in the end, at Lake Success, all these hazards were excluded from the combined American-French convention.

When work was begun on the third, or British convention, the difficulties pyramided. The list of specific exemptions, bad enough as it came from Geneva, was made considerably worse. It was voted, for example, to add to the explicit bases on which guarantees of freedom could be suspended, the following grounds:

For the prevention of the diffusion of reports for racial, national or religious discrimination.

For preventing the diffusion of false or distorted reports which undermine friendly relations between peoples or States.

It will readily be seen that such vague and general stipulations would permit the complete nullification of any guarantees of freedom. The British denounced their own convention, with these additions, and supported a proposal to defer work on it until the Fourth Assembly should meet in September. By that time, it was hoped that diplomatic interchanges would have removed some difficulties.

To some delegations, the British convention (now called the second convention) consists of obligations of the press, while the first convention consists of privileges for the press. This is not the viewpoint of the British, American, or other delegations. But the great majority of have-not nations (they "have not" large, powerful press associations or the concept of the free press which has grown up in English-speaking and western-European countries) have little enthusiasm for the first convention. They insist that the two conventions must be coupled together. Partly to meet this view, it was agreed not to open the first convention to signature and ratification (although it is completed) until the second convention has been disposed of. That will be the task of the Fourth Assembly.

V

THE FUTURE

There will be many sticky problems ahead, before the second convention is either amended so that American, British and other governments can accept it, or is placed indefinitely on the shelf. If it is adopted, against British-American protests, they and a considerable number of nations can never sign it. Possibly their reluctance will doom the first convention, too, as a reprisal by the other nations which do not like it.

There are, therefore, the following alternative possibilities as the outcome of these years of United Nations' effort:

(1) The first convention on Gathering and International Transmission of News and the International Right of Correction may be signed and ratified. It should then prove to be a moderate and practical aid to news-gathering and dissemination

in many parts of the world. Since the Soviet Union and its satellites have repeatedly proclaimed their deep repugnance for the treaty, they are most unlikely to sign it. Therefore the treaty would do no immediate good in the areas where restrictions are greatest. It would not directly help to lift the iron curtain. But it would be of value, all the same. It would be a beginning: an initial charter of liberties for the indispensable act of gathering and transmitting news, with the addition of the right of correction.

(2) The second convention on Freedom of Information may be signed and ratified. Even if improved, it is unlikely that the United States would find it worth while to support this document. Its advantages, such as they may be, are to be duplicated in the Covenant on Human Rights. The convention, at best, is a noble declaration of principles. At worst, it could be the basis of restrictive action, serving perhaps to nullify the advantages of the first convention, and even worse, to set up barriers and controls which do not exist.

(3) The United States Senate might choose not to ratify the first convention. In that case, if other nations did so and the treaty came into operation, all its guarantees and advantages could be limited legally to correspondents and information agencies of signatory states. American correspondents and agencies could be the victims of the most severe discriminations in history. This is a serious possibility, which calls for careful study.

(4) Both conventions may fail the necessary signatures or ratifications, for one reason or another. In that case, the primary blame can be placed on today's international climate, which has certainly not turned out to be salubrious for new freedoms in areas where they are now restricted.

Two great facts stand out. One is the familiar truth on the basis of which the entire freedom of information crusade is premised: that it is highly important to the cause of peace and understanding to reduce present barriers. This will remain true whatever happens to the present crusade. But these experiences may raise great questions regarding the possibility of freedom coming through governmental action. It is quite likely that greater progress could now be made through cooperative efforts of the information media themselves.

The second fact is that the United States and its news organs are in the line of fire, which is perhaps the unavoidable fate of a great power. There is much resentment against these agencies on the part of foreign governments—though not necessarily on the part of foreign newspapers or peoples. Our newspapers and information agencies are big, strong, rich, powerful. They are a tempting target. Everyone wants to get his story in the American press, nearly everyone feels he is misrepresented there.

If the United Nations, or any other organism, is to make genuine progress toward reducing information barriers, it will be because the press itself has awakened far more realistically than at present to the essence of the problem.

NATIONAL MINORITIES: A CASE STUDY IN INTERNATIONAL PROTECTION

MARY GARDINER JONES*

INTRODUCTION

Characteristic of twentieth century society is its increasing emphasis on the group as a means for the individual to realize many of his basic aims and desires.[1] As one authority has pointed out, "the scale of a modern society, the mobility, the range of communications, the variety of interests, the necessities of specialization—all these combine to make any modern society . . . multi-group society."[2] The same author has emphasized the necessity for achieving a decent ordering of those intergroup relations if democracy is to flourish. A special aspect of this problem is presented by those groups which are formed not by reason of the special economic, social, or political interests of their members but rather by virtue of the similarity of their members with respect to race, language, or religion. The problem of the relationship of such "national minorities" to the majority is complicated by the fact of their frequent identification either in their own minds or in the minds of the majority with another political state which may represent a different cultural pattern, different traditions, and in some cases wholly different principles and values. Thus the factors involved in a harmonious adjustment of these intergroup relations are peculiarly international in nature and have accordingly given rise to demands for an international solution.

While both the Hungarian[3] and the proposed Austrian[4] peace treaties as well as

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[1] A moment's reflection will conjure up countless groups with which an individual associates himself in order to accomplish certain ends. Labor unions, employers' associations, lobbies, Masons, Rotaries, women's and professional groups, literary and musical clubs, represent only a few which could be listed. One evidence of the importance of such group activity can be seen in the persecution of Free Mason groups in Germany and France by Hitler and his henchmen during World War II, and in the present attempts by the eastern European regimes to break down the dominance of the Roman Catholic Church. To destroy the group is to vitiate the effectiveness of the individual member. See in this connection, MacIver, *Summation* in GROUP RELATIONS AND GROUP ANTAGONISMS 215, 222 (1944); and Cole, *Europe's Conflict of Cultures, id.* at 121.

[2] MacIver, *Group Images and Group Realities* in GROUP RELATIONS AND GROUP ANTAGONISMS 3, 6 (1944).

[3] All the peace treaties concluded with Italy, Bulgaria, Hungary, Rumania, and Finland contain provisions obligating these countries to secure to all inhabitants the enjoyment of human rights and fundamental freedoms. Italy: Art. 15; Bulgaria: Art. 2; Hungary: Art. 2; Rumania: Art. 3; Finland: Art. 6. (Dep't State Pub. 2743, Eur. Ser. 21 (1947)). In addition, provisions with respect to nationality and option rights are contained in the Italian peace treaty (Arts. 19 and 20). Only the Hungarian treaty, however, contains any specific reference to minorities. In Article 5 of this treaty, Hungary has obligated herself to negotiate with Czechoslovakia for the solution of the problem of inhabitants of Magyar ethnic origin residing in Czechoslovakia.

[4] According to reports, agreement has been reached on the rights and privileges to be enjoyed by the Slovene and Croat minorities in Austria. These rights include: (1) equality of treatment between

certain national constitutions,[5] contain some provision for the protection of minority rights, countless minority groups throughout the world remain without legal protection of any kind. Considerable progress has been achieved by the United Nations in securing certain basic rights to every individual regardless of race, color, creed, or nationality,[6] but the formulation of a similar charter for the protection of group rights—or as they are more popularly referred to, minority rights—has made little progress.[7]

One major source of difficulty arises from the complexities of the group types which might form the object of protection, and from the unwillingness of states to accord legal recognition to what they regard as external interference with their domestic affairs. Another stems from a lack of conviction as to the necessity for special group protection in addition to that sought to be accorded to the individual.

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minority and majority including the right to form their own organizations, to hold meetings, and to maintain their own press; (2) the right to primary school education in their own language and to secondary education in their own schools; (3) recognition of Croat and Slovene languages as official for administrative and judicial purposes in areas where minorities are resident; (4) the right to share equally in the judicial and administrative system in these areas; and (5) the right to protection against activities of any organization designed to deprive them of their minority character and rights. N. Y. Times, Aug. 25, 1949, p. 9, col. 1.

[5] See, for example, ALBANIAN CONST. Art. 35, guaranteeing national minorities the right to enjoy equality of treatment with other citizens and the freedom to use their own language and develop their own culture; Australia, Sec. 51, empowering Parliament to enact legislation with respect to the people of any race for whom it is deemed necessary to enact special laws; Belgium, Art. 23, providing that the use of languages in Belgium is optional and that legislation may be enacted for its regulation with regard to the acts of public authorities and for judicial proceedings; Brazil, Art. 168, requiring that all primary schooling be given in the national language; Bulgaria, Art. 79, granting national minorities the right to be educated in their vernacular and to develop their national culture; Burma, Art. 22, prohibiting discrimination with regard to the admission into state educational institutions against religious, racial, or linguistic minorities and prohibiting the imposition of religious instruction upon such minorities; Bylo Russian Sov. and Soc. Rep. Art. 86, guaranteeing minorities free use of their language in judicial proceedings; Canada, (Br. N. Am. Act 1867, sec. 133), providing for use of English or French in legislative debates and judicial proceedings; China, Art. 168, providing that legal protection is to be accorded to racial groups in the border areas and that the state shall take positive action for the development of educational culture, public health, and economic and social enterprises of racial groups in the border areas; Czechoslovakia (draft of new constitution not available); Finland, Art. 14, providing that both Finnish and Swedish shall be the national language; Italy, Art. 6, declaring it to be the duty of the state to protect linguistic minorities; Panama, Art. 81, requiring authorization in order to teach in a foreign language, and Art. 94, guaranteeing special protecting to peasants and indigenous communities in order to integrate them into the national life and yet to preserve and develop the value of their autochthonous culture; Transjordan, Art. 21, conferring rights on various "societies" to establish and maintain their own schools; Ukranian Soc. Sov. Rep. and U.S.S.R. (see provisions of Const. of Bylo-Russian Soc. Sov. Rep.); Yugoslavia, Art. 13, extending the right to national minorities to enjoy their own cultural development and free use of their own language. YEARBOOK OF THE UNITED NATIONS, 1947; also U. N. Doc. E/C.N. 4/Sub. 2/4 (Oct. 8, 1947).

[6] In the United Nations Charter is recorded the solemn obligation of the member nations to promote and encourage universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion (Arts. 1, 13, 55, 56, 76); and to develop friendly relations among nations based on respect for the principle of equal rights and self determination of peoples (Art. 1). U. N. CHARTER (Dep't State Pub. 2353, Conf. Ser. 74).

On December 10, 1948, the General Assembly unanimously approved a Declaration on Human Rights enumerating the basic civil, political, economic, and social rights which should be secured to every individual in pursuance of the U. N. Charter provisions. For text, see Dep't State Pub. 3381 (Int. Org. and Conf. Ser. III, 20) U. N. Doc. No. A/811, Dec. 16, 1948.

[7] See *infra* pp. 624-626.

In order to assess these difficulties, and to explore the potentialities of international protection for group rights, it is necessary to have some understanding first, of the basic problems of minorities and second, of the experience of the League of Nations in what represented the first attempt on the part of the international community to implement minority protection by the collective guarantee of a neutral international organization.

I

THE PROBLEM OF MINORITIES

Groups differing from a majority of the population by reason of their race, language, or religion exist throughout the Western Hemisphere,[8] Europe,[9] the Middle East,[10] and the Southeast Asian area.[11] In some cases, the presence of minority groups in these areas has resulted from entirely voluntary immigration;[12] in other cases it has been brought about by conquest or wartime territorial transfers;[13] and in still others as a result of treaty commitments unrelated to such wartime transfers.[14]

Frequently a close correlation exists between the origin of the minority and its general attitude towards the members of the dominant group to which it is attached. Both factors are influential in the policy of the majority towards its minority groups. Thus a minority which has voluntarily emigrated to a country such as the United States, for example, attempts to assimilate itself as quickly as possible into the American way of life. It therefore affords less provocation to the dominant group

[8] For discussion of minority groups in the United States, see Nelson, *Religion and Racial Tension in America Today* in APPROACHES TO NATIONAL UNITY 544 (1945); and Ascoli, *The Italian Americans* in GROUP RELATIONS AND GROUP ANTAGONISMS 31 (1944); for similar discussion of minority groups in Latin America, see Tannenbaum, *Minorities in Latin America* in GROUP RELATIONS AND GROUP ANTAGONISMS 171 (1944).

[9] In eleven East-Central European States, for example, the proportion of minorities in the total population ranges from a low of 8 per cent (Czechoslovakia) to a high of 31 per cent (Poland). The number of minority groups in each state ranges from two (Albania) to eight (Yugoslavia). For more complete data, see Cole, *Europe's Conflict of Cultures* in GROUP RELATIONS AND GROUP ANTAGONISMS 121 (1944); also OSCAR I. JANOWSKY, NATIONALITIES AND NATIONAL MINORITIES (1945).

[10] A. HOURAMI, MINORITIES IN THE ARAB WORLD (1947).

[11] Most of the Southeast Asian nations and territories are populated by Indians, Chinese, Hindus, and a variety of other miscellaneous racial and nationality groups. For details on minority problems and cultural frictions in Burma, see C. H. T. CROSTHWAITE, THE PACIFICATION OF BURMA (1912); for Indonesia, see JOHN S. FURNIVALL, NETHERLANDS INDIA (1944), and *Indonesia: Crossroads in American Policy*, 1 AMERICAN PERSPECTIVE 382 (1947); for the Malayan Peninsula, see Rawlings, *Malaya* (Pamph. 1945); and Barnett, *Malaya* in DEVELOPMENT OF SELF RULE AND INDEPENDENCE IN BURMA, MALAYA AND THE PHILIPPINES; for India, see Shridharani, *Minorities and the Autonomy of India* in GROUP RELATIONS AND GROUP ANTAGONISMS 199 (1944).

[12] For example, in the United States and in certain of the Southeast Asian countries.

[13] Europe of course constitutes the best example of this type, see note 9 *supra*.

[14] Perhaps the most familiar example of this type is the Indian immigration into South Africa during the 19th century. For summary of the history of Indian immigration and attempted assimilation in South Africa, see documents submitted by India and South Africa to the United Nations in connection with Indian charges of violations by South Africa of its human rights obligations assumed under the U. N. Charter, summarized by Gross, *The Impact of the United Nations Upon Domestic Jurisdiction*, 18 DEP'T STATE BULL. 263 (1948); also U. N. Docs. A/68 (Aug. 26, 1946), and A/373 (Sept. 2, 1947) (Indian Memoranda).

to take discriminatory measures against it or to adopt policies of enforced denationalization. Generalization on this point, however, is impossible. Thus in South Africa, although the Indians immigrated originally as contract laborers, they remained voluntarily and attempted to assimilate themselves to South African customs. Their efforts met with immediate resistance from the South Africans, who represented the dominant and more advanced cultural group although a numerical minority.[15] Only recently the South African government has announced that it will enforce a rigid policy of segregation of races accompanied by affirmative attempts to awaken the cultural consciousness of the negro and Indian members of its population.[16] In many Southeast Asian countries, while immigrant groups came voluntarily, many maintained a rigid sense of group solidarity, refusing to assimilate to what they regarded as a culturally inferior way of life. Many were unable to live peacefully alongside the majority group and suffered frequent economic discrimination and occasional personal violence.[17] A similar history of discrimination, violence, enforced denationalization, or compulsory migration or expulsion has characterized the experiences of numerous European sub-cultural groups[18] which have clung tenaciously to their own tradition, folklore, and cultural patterns regardless of the political state under whose aegis the exigencies of war and conquest placed them. Yet both Switzerland[19] and the Soviet Union[20] and to a lesser extent Czechoslovakia attest to the possibility of maintaining cultural autonomy without intergroup friction and tension.

It is difficult to formulate a definition of a minority which would cover these diverse groups. It is obvious that such a definition cannot be based on a classification of minority groups in terms of their origin, the political organization of the host state, the degree of desired assimilation, or the relative economic and cultural superiority of the minority and majority. A common definition describes the term minority as referring to "groups of persons who differ in race, religion or language from the majority of the inhabitants of the country."[21] The very simplicity of the definition, however, tends to obscure the dual nature of the minority problem. On the one hand, a minority exists if its members look upon themselves as possessing a distinct national consciousness accompanied by linguistic and/or cultural characteristics which differ from those prevailing among the majority.[22] National conscious-

[15] For summary of South African policies adopted towards its Indian population, see U. N. Doc. A/68 (Aug. 26, 1946) and A/373 (Sept. 2, 1947); also N. Y. Times, July 12, 1949, p. 9, col. 5.

[16] Christian Science Monitor, Aug. 6, 1949, p. 4.

[17] See note 4 *supra*.

[18] See note 9 *supra*.

[19] JANOWSKY, *op. cit. supra* note 9, at 37.

[20] *Id.* at 69.

[21] This is the definition suggested by ROSTING, PROTECTION OF MINORITIES BY THE LEAGUE OF NATIONS (1922); similar definitions have been advanced by LEYBURN, WORLD MINORITY PROBLEMS 2 (Pub. Aff. Pamph. No. 132). *Cf.* definition of minorities adopted in the Minorities Treaties, note 31, *infra* and tentatively by the U. N., note 126 *infra*.

[22] PABLO Y FLOREZ DE AZCARATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 13 (1945); ROUCEK, THE MINORITY PRINCIPLE AS A PROBLEM OF POLITICAL SCIENCE 22 (Pamph. undated); SULKOWSKI, THE

ness in this sense is not used to indicate political affiliation. It is essentially a psychological manifestation indicating a feeling of solidarity among members of a group who share common traditions, historical perspectives, and principles irrespective of whether that group has ever formed or been part of a political state or not. If an individual does not share these ideals with others in a group he does not belong even though he may be of the same race, speak the same language, and live in the same territory. On the other hand, members of a society may "create" a minority in their midst through their discrimination against certain members by reason of their religion, race, sex, color, social class, and the like, irrespective of whether these individuals entertain a national consciousness and sense of difference apart from the majority or not. It is this dual nature of minorities as embracing both "self made" and externally "created" groups which must be clearly perceived if effective and constructive solutions are to be found for the general problem of group frictions. Nor can the fact be ignored that many groups differing from the majority by race, language, or religion live peacefully alongside the majority and present no problems of this kind.

Anthropologists, religious leaders, and psychologists, discussing the possible solutions for this problem, agree that many of the causes of such frictions and tensions lie deeply rooted in the make-up of the human personality,[23] and can only be removed through a lengthy process of enlightenment and education. At the same time they disagree as to whether the problem is more appropriately approached through a renewed emphasis on the dignity of the human person,[24] or whether a more political approach is necessary whereby the state would recognize a type of cultural autonomy for the diverse elements of its population.[25] The argument in favor of the latter approach proceeds on the democratic assumption that there is value in heterogeneity and that human progress depends on a variety of cultural patterns and on the consequent impact of clashing ideas. Although seemingly inconsistent, the two approaches are reconcilable in terms of the type of minority which is involved. Thus emphasis on human dignity unless broadly construed would not suffice to cope with the problems encountered by the so-called "self made" minorities. On the other hand, application of a system of protection designed to guarantee cultural autonomy to an externally "created" minority would be productive of greater problems, difficulties, and deprivations than it could possibly hope to eliminate.

PROBLEM OF NATIONAL MINORITIES IN ITS SOCIOLOGICAL ASPECTS 5-7 (1943). A similar definition was put forward many decades before by J. S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 287 (1875).

[23] See generally LYMAN BRYSON, LOUIS FINKELSTEIN AND R. M. MACIVER (EDS.), APPROACHES TO NATIONAL UNITY (Symposium published by Conference on Science, Philosophy and Religion in their Relation to the Democratic Way of Life, Inc., (1945)); and especially Havighurst, *Education for Intergroup Cooperation*, *id.* at 387.

[24] Finkelstein, *The Jewish Minority* in GROUP RELATIONS AND GROUP ANTAGONISMS 85, 94, 95 (1944).

[25] Janowsky, *Ethnic and Cultural Minorities* in GROUP RELATIONS AND ANTAGONISMS 157, 168 (1944); MacIver, *op. cit. supra* note 1.

It is clear, however, that effective action with respect to the alleviation of minority-majority frictions—regardless of its nature—will prove unsuccessful if the problem is regarded as relating solely to the protection of the group against hostile state action. The Nazi exploitation of German minorities in neighboring states in furtherance of its infiltrative and other subversive policies illustrates in graphic fashion the type of problem which the presence of minorities may present to the state. Recent fears expressed with regard to possible pro-Russian sentiments among Yugoslavian minorities, and pro-Chinese sentiments among Indonesian minorities[26] reflect the continuing importance of this aspect of minority-majority relations. It is against this background of the problem that the question of international protection of minority rights must be considered.

II

INTERNATIONAL PROTECTION OF MINORITY RIGHTS UNDER THE LEAGUE OF NATIONS

A. Development of the Concept of Minority Protection

While international concern for the religious, civil, and political rights of minorities had been manifest as early as the sixteenth[27] and more particularly during the nineteenth centuries,[28] effective implementation of this concern by means of an international guarantee had not been attempted until the peace settlements following World War I.

As originally conceived by President Wilson, the principle of self determination through territorial revision was to be supplemented by a system of minority obligations imposed by the League of Nations Covenant on all new states and all states seeking admission to the League. Such obligations were to include guarantees of religious freedom to all inhabitants and equality of treatment between minorities and majorities.[29] Wilson's proposal for the incorporation of such guarantees in

[26] See, for example, N. Y. Times, Aug. 23, 1949, p. 6, col 3; N. Y. Herald Tribune, Aug. 30, 1949, p. 22, col. 5.

[27] In the treaties concluded with the Ottoman Empire (capitulations) and later extended to the Far East, provision was made for the exercise of extraterritorial jurisdiction to be exercised by the diplomatic agents of the Christian powers over their subjects residing in these countries, thus affording a type of protection to religious and national minorities within the states. Sulkowski traces the first modern effort to protect religious minorities back to the Treaty of Augsburg in 1555 and the Treaty of Westphalia in 1648, guaranteeing religious freedom to the states. SULKOWSKI, THE PROBLEM OF INTERNATIONAL PROTECTION OF NATIONAL MINORITIES 6-7 (1944).

[28] The various treaties concluded in this century relating to the protection of individual rights are collected and summarized in L. P. MAIR, THE PROTECTION OF MINORITIES 30-34 (1928). They include the Congress of Vienna (1814) guaranteeing the equality of Dutch citizens and religious freedom; the Protocol of 1830 relating to the establishment of the Kingdom of Greece, guaranteeing freedom of religion to all Greek subjects; the Conference of Constantinople (1856) guaranteeing religious freedom and equality of civil and political rights to Moldavians and Wallachians; and the Congress of Berlin (1878) guaranteeing similar rights to the inhabitants of Rumania, Serbia, Montenegro, and Bulgaria in order to protect the Jews and Moslems from discrimination. See also 5 HAROLD W. V. TEMPERLEY (ED.), A HISTORY OF THE PEACE CONFERENCE OF PARIS 112, 114 (1921).

[29] In Wilson's second draft of the League Covenant submitted in January, 1919, he proposed the inclusion of an article which provided that:

> "The League of Nations shall require all new states to bind themselves as a condition precedent to their recognition as independent or autonomous states, to accord to all racial

the League Covenant, however, was rejected by the Supreme Council, in part because of the "extreme delicacy of the issues involved,"[30] and the matter was left to be dealt with on a case to case basis in the peace treaties and territorial settlements.[31] Among the states forced to accept such obligations, immediate opposition was raised by Yugoslavia, Rumania, and Poland, who protested that the system of minority protection as thus conceived constituted an infringement of their sovereignty, an impugnation of their good faith, and a violation of the principle of equality among nations. Resentment was particularly acute by reason of the fact that the Great Powers and more particularly Germany and Italy were not required to assume comparable obligations.[32] Their objections proved unavailing and as the system finally emerged, ten states, primarily in central and eastern Europe, which as a result of territorial adjustments contained substantial minority groups, were required to

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or national minorities within their several jurisdictions exactly the same treatment and security, both in law and in fact, that is accorded to the racial or national majority of the people."

In his third Covenant Draft, Wilson proposed the inclusion of an additional article on religious freedom providing that:

"Recognizing religious persecution and intolerance as fertile sources of war, the Powers signatory hereto agree, and the League of Nations shall exact from all new states and all states seeking admission to it the promise, that they will make no law prohibiting or interfering with the free exercise of religion, and that they will in no way discriminate, either in law or in fact, against those who practice any particular creed, religion or belief whose practices are not inconsistent with public order or public morals."

2 DAVID H. MILLER, THE DRAFTING OF THE COVENANT 91, 105 (1928).

[30] Opposition in the Supreme Council to the inclusion of minority obligations in the League Covenant was led most vigorously by the British delegate, Lord Robert Cecil. MILLER, *op. cit. supra* note 29, at 129-130, 273-274, 282, 286-287. The position of the Council had already been foreshadowed in the doubts expressed by David Hunter Miller as to the practicability of such generalized treatment for all minorities as was provided for in Wilson's second draft. MILLER, *op. cit. supra* note 29, at 91.

[31] Detailed minority obligations were assumed in the Peace treaties by Austria (Treaty of St. Germain-en-Laye, Arts. 62-69); Hungary (Treaty of Trianon, Arts. 54-60); Bulgaria (Treaty of Neuilly-Sur-Seine, Arts. 49-57); and Turkey (Treaty of Sevres, Arts. 140-151, and Treaty of Lausanne, Arts. 37-45). For treaty texts, see 1 and 2 THE TREATIES OF PEACE 1919-1923 (Carnegie Endowment for International Peace, 1924).

In addition, Czechoslovakia, Poland, Rumania, Greece, Yugoslavia, and Armenia agreed to embody into a treaty "with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants of that State who differ from the majority of the population in race, language, or religion." Treaty of Versailles June 28, 1949, Art. 86 (Czechoslovakia), Art. 93 (Poland); treaty of St. Germain-en-Laye, Sept. 10, 1919, Art. 51 (Yugoslavia), Art. 57 (Czechoslovakia), Art. 60 (Rumania); Treaty of Trianon, June 4, 1920, Art. 44 (Yugoslavia), Art. 47 (Rumania); Treaty of Neuilly-Sur-Seine, Nov. 27, 1919, Art. 46 (Greece); Treaty of Sevres, Aug. 10, 1920, Art. 86 (Greece), Art. 93 (Armenia).

Such treaties were subsequently concluded by Poland (3 WILLIAM M. MALLOY, TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES AND OTHER POWERS 3714-3730, (1910-1923); Czechoslovakia (*Id.* at 3699-3708); Yugoslavia (*Id.* at 3731-3738); Rumania (*Id.* at 3724-3730); Greece (Protocol No. XVI attached to Treaty of Lausanne. 2 THE TREATIES OF PEACE, *supra*, 789-944). The treaty of Armenia became null as a result of the absorption of that country into the U. S. S. R. (*Id.* at XXXVI).

[32] Austria, Bulgaria, Hungary, Greece, and Czechoslovakia, although critical of some aspects of the treaties, accepted the principle of minority protection more willingly. A summary of the principal arguments pro and con is contained in 5 TEMPERLEY, A HISTORY OF THE PEACE CONFERENCE AT PARIS (1922); and JACOB ROBINSON AND OTHERS, WERE THE MINORITIES TREATIES A FAILURE 151-168 (1943). A similar mixed reception was accorded the Minorities Treaties by the European Parliaments and press. ROBINSON, *supra*, 168-174.

assume minority obligations. Subsequently six other territories assumed similar obligations either by unilateral declaration,[33] or by bilateral treaty.[34] Although the United States signed the minorities treaties concluded with Yugoslavia, Rumania, Czechoslovakia, and Poland, she failed to ratify these instruments and thus was not formally a part of the minority system.

The obligations assumed by these states fell roughly into four categories. The first, embracing citizenship rights, defined the conditions under which citizenship could be acquired.[35] In the second and third categories were included rights of life, liberty, and religious freedom of general applicability to all inhabitants;[36] and civil and political rights for all nationals, including equality before the law and equal access to civil service, business, and profession as well as the use of their own language in religion, press, and assembly.[37] Finally, certain special rights, designed to protect

[33] In Dec. 1920, the Assembly recommended that the Baltic and Caucasian States and Albania, in the event of their being admitted to the League, take necessary measures to enforce the principle of the Minorities Treaties and arrange with the Council to carry this object into effect. Finland made such a declaration on June 27, 1921, with respect to the inhabitants of the Aaland Islands (2 LEAGUE OF NATIONS, OFFICIAL JOURNAL 701-702 (1921) (hereafter cited as O. J.)); Albania signed a similar declaration on Oct. 2, 1921 (2 O. J. 1161-1164 (1921) and 4 *id.* 1466 (1923)); and Lithuania on May 15, 1922 (3 *id.* 536-537, 586-589 (1922); 5 *id.* 332-333 (1924)); Latvia on July 7, 1923 (4 *id.* 933, 1275 (1923)); Estonia on Sept. 17, 1923 (4 *id.* 1310-1312 (1923)); and Iraq on July 13, 1932 (33 *id.* 1557 (1932)).

[34] Poland and Germany concluded a Convention on May 15, 1922, providing for reciprocal protection of Polish and German minorities in Upper Silesia (Text of Convention can be found in JULIUS STONE, REGIONAL GUARANTEES OF MINORITY RIGHTS 213-262 (1933)); Lithuania concluded a convention relating to the Territory of Memel with the British Empire, France, Italy, and Germany on Oct. 3, 1924, under which Lithuania agreed to apply the terms of her Declaration (note 33 *supra*) to the inhabitants of Memel. 29 LEAGUE OF NATIONS, TREATY SERIES 85 and 91 (1924) (hereafter cited as LEAGUE TR. SER.). Poland and the Free City of Danzig signed a Convention extending the same guarantees assumed by Poland under its treaty with the Allied Powers (note 31 *supra*) to the minorities in Danzig (Art. 33) (6 LEAGUE TR. SER. 189-207 (1921)); Poland and Czechoslovakia by Convention of April 23, 1925, agreed to extend the treatment and protection of their mutual minorities to the Silesian territories of Teschen, Orava, and Spisz (48 LEAGUE TR. SER. 287-381 (1926)); and finally Czechoslovakia and Austria executed the treaty of Brunn on June 7, 1920, which included detailed provisions with regard to the acquisition of nationality (Arts. 1-16) and the rights of their respective minorities with regard to the use of their mother tongue and admission to educational institutions. (Arts. 17-19) (3 LEAGUE TR. SER. 189-207 (1921)).

[35] The general criteria of citizenship, adopted by most minority states, conferred automatic citizenship rights on those individuals who had resided habitually in the territory, or whose parents maintained such habitual residence, or who had been born in the territory and had no other nationality. (Poland, Arts. 3-6; Czechoslovakia, Arts. 3-4; Rumania, Arts. 3-4; Yugoslavia, Arts. 3-4).

In the Austrian and Hungarian treaties, citizenship was automatically conferred on all persons possessing on the effective date of the treaty rights of citizenship (pertinenza) (Austria, Art. 64 and Hungary, Art. 56). In the Bulgarian treaty, on the other hand, only persons who were habitually resident in the country on the effective date of the treaty were eligible for citizenship (Art. 51). The Turkish treaty contained special nationality provisions apart from the general provisions found in all the peace treaties.

[36] Art. 2 of the Polish treaty, typical of the obligations undertaken in this respect by all the minority states, provides that:

> "Poland undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion.
>
> "All inhabitants of Poland shall be entitled to the free exercise, whether public or private, of any creed, religion or belief, where practices are not inconsistent with public order or public morals." 3 MALLOY, *op. cit supra* note 31, at 3717.

[37] See, for example, Art. 7 of the Polish treaty (note 31 *supra*) which provides that:

> "All Polish nationals shall be equal before the law and shall enjoy the same civil and

their cultural identity, were guaranteed to all nationals belonging to racial, religious, or linguistic minorities. These rights included the free enjoyment of equal treatment and security in law and in fact with other nationals; the receipt of primary school education in their own language; the right to establish under their own control charitable, educational, social, and religious institutions; and the right to share equitably in the enjoyment and application of public funds allocated for educational, religious, or charitable purposes.[38] In addition, certain of the treaties contained special provisions for the protection of particular minority groups,[39] such as the Jews in Poland,[40] the Mussulmans in Yugoslavia,[41] the Saxons and Czecklers in Rumania,[42] the Ruthenians in Czechoslovakia, and certain others.[43] A majority of the states making unilateral declarations of adherence to the minority system adopted substantially similar obligations.[44] The bilateral arrangements, on the other hand, frequently contained more elaborate and detailed substantive provisions relating to the educational rights of minorities and other matters.[45]

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political rights without distinction as to race, language or religion.

"Differences of religion, creed or confession, shall not prejudice any Polish national in matters relating to the enjoyment of civil or political rights, as for instance admission to public employments, functions and honors, or the exercise of professions and industries.

"No restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings.

"Notwithstanding any establishment by the Polish Government of an official language, adequate facilities shall be given to Polish nationals of non-Polish speech for the use of their language, either orally or in writing, before the Courts." *Id.* at 3718.

[38] See, *e.g.*, Articles 8 and 9 in the Polish Treaty. *Ibid.*

[39] In the Treaty of Sevres, for example, Turkey assumed a special obligation to respect the ecclesiastical scholastic autonomy of all racial minorities. (Art. 149).

[40] Poland agreed to the establishment by the Jews of Educational Committees to distribute the public funds received for educational purposes and to organize and manage the Jewish schools. (Art. 10). In addition Poland obligated herself not to compel the performance of any act by a member of the Jewish minority which would constitute a violation of the Sabbath. (Art. 11).

[41] Art. 10 of the Yugoslavian Treaty (note 31 *supra*) granted the Mussulmans virtual autonomy in matters of family law and personal status and guaranteed the protection of their mosques, cemeteries, and other religious establishments.

[42] Art. 11 of the Rumanian Treaty (note 31 *supra*) guaranteed the Saxons and Czecklers scholastic and religious autonomy.

[43] Czechoslovakia undertook to accord the fullest political autonomy to the Ruthenians in the Carpathian Territory. (Arts. 10-12).

[44] An exception was the Finnish Declaration (note 33 *supra*) in which Finland bound itself to guarantee to the population of the Aaland Islands the preservation of their language, culture, and local Swedish traditions (Art. 1), and specifically the compulsory use of Swedish in the schools, the continued ownership of property solely in hands of legal residents, and the right to use 50 percent of tax revenues for Aaland Island purposes.

[45] See, for example the Czech-Polish Convention relating to Silesian Teschen, Orava, and Spisz in which specific provision was made that the upholding of minority rights should not be regarded as an act of disloyalty (Art. 12) and that no pressure should be exercised with a view to persuading parents to send their children to a school which did not teach in the language of their mother tongue (providing expressly that the declaration of the individual as to his mother tongue could not be disputed) (Art. 13). The use of their own language in the courts and other official bodies was spelled out in considerable detail (Arts. 14-16), as were the educational rights granted to minorities (Arts. 17-21). See also Brunn Convention executed by Czechoslovakia and Austria (note 34 *supra*) containing detailed provisions with respect to educational rights of their minorities, and the German Polish Convention relating to Upper Silesia (note 34 *supra*).

Under the general minorities treaties each state bound itself to incorporate these provisions into its fundamental law and acknowledged that in so far as the stipulations affected persons belonging to racial, religious, or linguistic minorities they constituted obligations of international concern and were to be placed under the guarantee of the League of Nations.[46] It was further recognized that any member of the League Council should have the right to bring any infraction or danger of infraction of minority rights to the Council's attention and that the Council would then take such steps as it deemed proper. Finally, each signatory state agreed that any difference of opinion as to questions of law or fact arising with respect to the treaty obligations was to be submitted to the Permanent Court of International Justice.[47]

In addition to this general system of minority protection, special regional procedures existed for the settlement of minority disputes arising in Danzig, Silesian Tseschen, and Upper Silesia.[48] In the Convention on Upper Silesia,[49] the most elaborate of the regional procedures established, rights of petition and appeal were expressly granted to individual members of the minority,[50] and investigatory and adjudicatory functions were conferred on special local bodies, which included a Minorities Office in the state to which the minorities belonged,[51] a Mixed Commission

[46] Thus under the so-called guarantee clause the stipulations guaranteeing general rights and freedom to all *inhabitants* or *nationals* (other than members of minority groups) were exempted from the League enforcement system, although they remained at least in theory as an international obligation of the signatory state.

Some question arose as to whether the nationality provisions of the Minorities Treaties were subject to the League Guarantee. One author states categorically that they were not. L. P. MAIR, THE PROTECTION OF MINORITIES 220 (1928). The Permanent Court would seem to have answered the question in the negative. Acquisition of Polish Nationality, Ad. Op. 7, Sept. 15, 1923, I MANLEY O. HUDSON, WORLD COURT REPORTS 237.

[47] See, *e.g.*, Art. 12 of the Polish Treaty, 3 MALLOY, *op. cit. supra* note 31, at 3719. Substantially similar procedural obligations were accepted by those states adhering to the system by Declaration.

Finland agreed to place her guarantees with respect to the Aaland Islands under the protection of the League; to transmit to the League any petitions submitted to the *Landsting* of Aaland in connection with violations of these guarantees; and finally to consultation of the Permanent Court by the Council in the event of a juridical dispute. (see note 33 *supra*). In the Latvian and Estonian Declarations, the right of the League to accept and transmit petitions to the Council relative to alleged minority infractions was recognized and an obligation assumed to furnish the League on request with appropriate information; finally the Permanent Court was acknowledged as competent to give an advisory opinion on questions of law or fact arising out of the Declarations (note 33 *supra*).

[48] In the Polish-Danzig Convention (note 34 *supra*), provision is made for the submission of disputes first to the High Commissioner and second to the League Council—this it would seem constitutes an additional procedural machinery for the settlement of minorities disputes.

Similarly in the Czech-Polish Convention relating to Teschen, Orava, and Spisz (note 34 *supra*) both a mixed commission and an arbitral tribunal were established for the settlement of disputes arising out of the interpretation of the Convention (Arts. 73-81). Similar machinery was established in the Brunn Convention by Austria and Czechoslovakia (Arts. 21-30) (note 34 *supra*). Note, however, that in the Brunn Convention the signatories expressly provided that disputes arising out of the Convention should *not* be submitted to the Permanent Court (Art. 31). This provision, however, would not affect either Czech or Austrian obligations in this respect under their Minorities Treaties concluded with the Allied and Associated Powers. (Note 31 *supra*).

[49] See note 34 *supra*.

[50] Art. 147.

[51] Arts. 148-152, which constituted in effect an informal administrative appeal body charged with the duty of receiving and examining petitions after the complainant had exhausted his appropriate remedies under state law.

composed of representatives of both states and presided over by a neutral President,[52] and an Arbitral Tribunal.[53] In addition, recourse was permitted to the League Council in the event that satisfaction was not available under the regional machinery.[54]

Thus amidst the bitter opposition of some states and the lukewarm support of others, the minorities experiment was inaugurated. From its inception, the concept of minority protection was regarded as a political rather than a humanitarian measure—one designed to avoid friction and to eliminate elements of disturbance in those European states which either had received substantial territorial accessions or were newly constituted but contained heterogeneous populations. As Clemenceau pointed out in his famous letter to Paderewski,[55] at that time Foreign Minister of Poland, while the concept of minority protection constituted no innovation in international practice, the system of enforcement by an international body marked a new precedent designed to prevent unwarranted political interference in the domestic affairs of a state by one or several powers and to provide instead for supervision of such rights by a neutral international authority. The justification for the system, according to Clemenceau, lay in the Allied conviction that because of the new territorial arrangements under which populations had been shifted to new sovereignties, "these populations will be more easily reconciled to their new positions if they know that from the very beginning they have assured protection and adequate guarantees against any danger of unjust treatment or oppression."

While these statements reflect the basic impetus for the establishment of the system, the League's concept of its responsibilities under the treaties is best reflected in the statement of the French diplomat, Aristide Briand, made to the Assembly in 1929. Briand declared:[56]

> It is in no way to the interest of a country that the element of its population which has its own value and its own characteristics should disappear and a great country which realizes its own strength does not endeavor to bring about any such disappearance. It does not try to reduce its population to a uniform level. On the contrary, the strength of a country consists in assimilating various elements of its population without letting them lose their own characteristics and qualities. It is in this way that a country develops and acquires its full strength which enables it to expand. Those who think of reducing a country to one uniform pattern by suppressing the individual characteristics of each of the elements of its population are doomed to many reverses. . . . That, however, is not the real problem. The real problem is, while ensuring that the minorities shall pre-

[52] Arts. 152-156. In all cases where the complainant failed to receive satisfaction from the Minorities Office, the latter was bound to forward the petition to the Mixed Commission for its opinion. The Mixed Commission was empowered to make whatever investigation it deemed necessary and to recommend either a partial, final, or provisional solution.

[53] Arts. 158, 588. Any question of interpretation was to be submitted to an Arbitral Tribunal, whose decisions should be binding on all parties.

[54] Art. 157.

[55] Letter dated June 24, 1919, reproduced verbatim in 5 TEMPERLEY, *op. cit. supra* note 28 at 432-437 (App. IV).

[56] LEAGUE OF NATIONS, PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES BY THE LEAGUE OF NATIONS 101-102 (C. 8.M.5. 1931. I).

serve their language, culture, religion and traditions to keep them as a kind of small family within the larger family not with the object of weakening the larger family, but with the object of harmonizing all its constituent elements with those of the country as a whole. The process at which we aim is not the disappearance of the minorities but a kind of assimilation which will increase the greatness of the nation as a whole without in any way diminishing the importance of the smaller family. That is how I understand the problem of minorities.

B. Minorities System in Operation[57]

Since the minorities treaties contained only brief reference to the manner in which the League was to fulfill its guarantee of minority rights,[58] at the outset the League Council had to devise its own procedural rules. In October, 1920, after considerable debate on the nature of the guarantee[59] assumed by the League, the Council adopted a resolution which established the basic procedural machinery for the submission and consideration of minorities questions.[60] This system was characterized by two main features: first, the establishment of a right of petition in favor of non-Council members as well as the minorities themselves or persons acting on their behalf; and second, the creation of minorities committees, composed of three Council members, charged with the duty of examining all petitions submitted and making recommendations to the Council as to whether it should take action or not. Impetus for the institution of this procedure stemmed from the desire of the Council members to avoid the "invidious" and "thankless" task of acting as an accuser of a sister state by virtue of the minorities treaty provisions requiring that alleged violations of minority obligations be brought to the Council's attention by a Council member.[61] But the resultant advantages accruing to minority groups by reason of the petition system evoked immediate opposition from the minority states, who challenged the legality of the procedure and protested that its only effect was to grant to minorities and other states a new vehicle for irredentist and other hostile propaganda and thereby to impede the peaceful adjustment of minority-majority

[57] The material which follows in this and succeeding sections will deal with the operation of the general minorities system as distinguished from the regional systems such as prevailed in Upper Silesia. References to the latter will be made from time to time in the footnotes to indicate the major differences between the two systems.

[58] Three provisions were made: (1) that the minority provisions were to be made a part of the fundamental law of the land; (2) that any dispute relating to an infringement—actual or potential—was to be referred to the League Council; and (3) that any question of law or fact arising out of the interpretation of a minority treaty was to be submitted to the Permanent Court of International Justice. See notes 46 and 47 *supra*.

[59] Pursuant to Council direction M. Tittoni (delegate from Italy) submitted a Report to the Council on this question in which he concluded that (1) the minorities provisions were inviolable and incapable of modification without Council approval; (2) the Council had both a right and duty to see that the minorities provisions were observed and to take action in the event violations occurred; and (3) that the Council had no legal obligation to accept the guarantee but that its repudiation would be politically impossible. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES BY THE LEAGUE OF NATIONS, *supra* note 56, at 5.

[60] Adopted at the 10th session of the Council, Oct. 22, 1920. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 9-11.

[61] See particularly remarks of Lord Balfour (United Kingdom) and M. Hymens (Belgium) in the 10th session Council debate. *Ibid.*

relations.[62] The League refused to accede to the arguments based on the illegality of the system and was eventually sustained in this position by the Permanent Court of International Justice, which ruled that the Council had a right to regulate its precise procedure and that it was immaterial how or by whom a member of the Council was induced to bring minorities questions to the attention of the Council.[63] The League, however, did agree to the introduction of certain modifications of the procedure, designed to safeguard the minority states against unjustified accusations. Under these amendments, conditions for the receivability of petitions were laid down,[64] opportunity was afforded the state concerned to submit its observations and comments on the facts alleged in a petition prior to its distribution,[65] communication of the petition plus the governmental observations if any were restricted to Council members only rather than circulated to all League members as had been the practice,[66] and, finally, eligibility of membership in the minority committees was confined to delegates of non-interested states in order to insure complete impartiality.[67]

As the system worked out in practice, the great bulk of the minorities work was performed by the Minorities Section which acted as a technical secretariat charged with the responsibility for securing information; and by the Minorities Committees whose primary duty was the evaluation of these facts as they bore on the subject matter of the petition. When a petition was first submitted to the League, its receivability was passed upon by the Secretary General with the assistance of the Minorities Section. In general all signed petitions were regarded an emanating from an "authenticated source," even if they were submitted from persons or organizations which did not belong to the minority nor even to the country in which the

[62] In 1921 and again in 1923 Poland and Czechoslovakia employed these arguments in support of their proposals for these amendments of the 1920 procedure: (1) that petitions be submitted in the first instance to the government concerned; (2) that no petitions should be received from international organizations; and (3) that petitions should be communicated only to Council and not all League members. Poland argued that the proposals were designed to reduce the load of the Council and to encourage minority groups to look to their own state rather than to foreign powers or to the League for redress of their grievances. *Id.* at 13-14; Letter of Benes (Czechoslovakia) April 5, 1923 to Secretary General (4 O. J. 717 (1923)); Letters of Modzelewski and Askenazy (Poland) Jan. 16, 1923 and Aug. 22, 1923 (4 *id.* 480, 1023 (1923)): Report to Council of M. Rio Branco (Brazil) Sept. 5, 1923 (4 *id.* 1426, Annex 558 (1923)).

[63] German Settlers in Poland. Ad. Op. No. 6, Sept. 10, 1923, 1 MANLEY O. HUDSON (ED.), WORLD COURT REPORTS 207 (1934-35).

[64] Resolution adopted by Council, Sept. 5, 1923. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 7-8.

Five criteria were established: (1) petitions must relate to minority protection as provided for in the Treaties; (2) must not relate to matters recently made the subject of petitions; (3) must not be submitted in the form of a request for the severance of political relations between the minority and the state to which it owed allegiance; (4) must not emanate from an anonymous source; and (5) must abstain from violent language.

[65] Resolution adopted June 27, 1921. *Id.* at 7.

[66] Resolution adopted September 5, 1923. *Id.* at 8.

[67] Resolution adopted June 10, 1925. *Ibid.* The Council ruled that no member of a Committee established to investigate a petition could be a representative of the state to which the petitioning minority belonged; of a neighboring state, or of a state a majority of whose citizens "belong from the ethnical point of view to the same people as the minority in question."

minority was attached.[68] This practice was repeatedly challenged by the minority states[69] but was eventually sustained by the Permanent Court.[70] Some of the difficulties[71] arising with respect to the question of receivability are illustrated by two cases brought before the League Council by Lithuania and Germany respectively. In both, the receivability of the petition was challenged on the ground that the persons whose rights had allegedly been infringed did not actually belong to a minority group within the meaning of the treaty. The issue turned on whether a question of status should be regarded as jurisdictional or substantive in nature. In the Lithuanian case,[72] the Council ruled that the issue of status was one of substance to be determined after examination and did not affect the question of the receivability of the petition. In the German case,[73] on the other hand, the question of status was referred by the Council to a Committee of Jurists which ruled in favor of receivability. The difference in treatment, however, may have been due to the fact that in the German case the issue involved an interpretation of the Upper Silesian Minority Convention, although it would not seem that the preliminary issue of receivability before the Council should have been treated differently on that account. In view of the fundamental importance and complex nature of the question of minority status, the Council's decision in the Lithuanian case would seem to offer a greater protection to minority groups, who might otherwise have found themselves denied all recourse to the League by a preliminary decision of the Secretariat adverse to such status, against which they had no appeal.[74]

[68] REPORT OF THE COMMITTEE INSTITUTED BY THE COUNCIL RESOLUTION OF MARCH 7, 1929. O. J. Spec. Supp. No. 73, 193 (1929), hereafter cited as the LONDON REPORT.

[69] See notes presented to Secretary General by Czechoslovakia and Poland urging procedural amendments to the minorities systems. Both objected to the fact that petitions were accepted from international organizations who had no connection with either the minority or the country concerned. See note 62 *supra*. Similar complaints were made by Hungary and Czechoslovakia with regard to minority petitions submitted against them which emanated from nonlocal sources. 7 O. J. 145 (1926); and C 491. M. 354. 1921. I.

[70] See note 63 *supra*.

[71] Azcarate describes the sleepless nights spent trying to decide whether the language in a petition was "violent" or whether the source could be regarded as "well established," questions of importance primarily for reasons of the principle which demanded that each petition regardless of the importance of the substantive questions raised be carefully and impartially considered. PABLO DE AZCARATE, LEAGUE OF NATIONS AND NATIONAL MINORITIES 109 (1945); see also LONDON REPORT, *supra* note 68, at 193-194.

[72] Minutes of the 50th Session of Council, June 6, 1928. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 60-66 (1929).

[73] 14 O. J. 838-840, 934-935, Annex 1451a (1933).

[74] Prior to 1929 the League considered itself under no obligation to notify the petitioner as to the fate of the petition. LONDON REPORT, *supra* note 68, at 194. It was simply acknowledged unless the Secretariat felt that the petitioner was ignorant of the conditions of receivability, in which case their text was attached to the acknowledgment. *Id.* at 199-200.

In 1929 the Council resolved that petitioners be advised if their petition was declared nonreceivable and further that the Minorities Committees consider the advisability of soliciting additional information from petitioners when necessary. Resolution of June 13, 1929, PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 11-12. The hesitancy of the League to enhance and formalize the role of petitioners was occasioned by unwillingness to approximate the minorities procedure in any way to that of a judicial proceeding whereby a state could be placed by its own subjects in the role of a defendant before an international body. The petition system was regarded primarily as an informational device to assist the Council in the discharge of its functions under the minorities treaties. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* at 106-114, 129-137.

Once the receivability of a petition was sustained, an intensive investigation of the facts involved was undertaken by the Minorities Section and later by the Committee to which it was referred.[75] To the Minorities Section fell the task of communicating the petition to the government concerned and conducting whatever correspondence was necessary in order to ensure reasonable observance of the time limit within which its comments must be submitted. A detailed memorandum was then prepared summarizing the allegations and the observations of the government, together with such additional information as the Section was able to obtain on its own initiative through other channels. The major points on which the Committee would have to make a decision were carefully outlined, and the Director of the Minorities Section in presenting the case to the Committee frequently added his own observations and comments.

Preliminary examination of the petition by the Committee was then undertaken. In general the Committee refused to take action if the facts involved occurred before the inception of the minorities treaties,[76] if the issue was at the time of the petition still pending before the authorities of the minority state,[77] or finally if the alleged grievance related merely to an anticipated—rather than an actual—case of discrimination in the application of a statute which on its face appeared harmless.[78]

If the claims appeared to be clearly without foundation, the case was closed and the Council notified that no action was deemed necessary. If, on the other hand, the explanations of the government appeared unsatisfactory, the Committee opened negotiations with the government with the ostensible object of securing additional information. In fact, the negotiations were more frequently conducted for the purpose of inducing the state to adopt measures which would remedy the situation complained of and obviate the necessity for formally drawing the Council's attention to the dispute. The negotiations were generally carried on by members of the Minorities Section within certain broad objectives laid down by the Committee. Conferences were arranged with the governmental representatives either at Geneva or at the capital of the state concerned. In addition to these specific negotiations, members of the Minorities Section frequently made annual visits to the countries

[75] The material which follows on the work of the Minorities Section and the Minorities Committees is based primarily on the LONDON REPORT, *supra* note 68, at 42-64, and on AZCARATE, *op. cit. supra* note 22, at 109-301.

[76] See Committee's refusal to consider that portion of petition based on unwarranted refusal to induct petitioners into Czech army and consequent deprivation of pension rights by Czech government, on ground that facts relative to induction into the army occurred prior to effective date of Minority Treaty. 15 O. J. 1121 (1934).

[77] See for example, petition by member of Hungarian minority in Czechoslovakia alleging unjustified denial of citizenship rights and threatened expulsion. Since the case was to be retried by the Czech courts, the Committee refused to proceed with any investigation of the facts. 13 O. J. 183 (1932). See also C. 54. 1926. I.

[78] This position was taken by the Committee with respect to a petition submitted by the Catholic, Reformed, and Unitarian Churches of Transylvania protesting the text of a Rumanian education law. The Committee noted that while the general text of the bill appeared satisfactory, certain of its features might give rise to doubt in its application in the future but that this question was premature. 7 O. J. 741-742 (1926).

which had assumed minority obligations with a view to familiarizing themselves with the local conditions and problems and with the points of view of both official and nonofficial elements directly concerned with minority problems.

Where the Minorities Committees were unable to effect any compromise or modification of the situations complained of, formal recommendation might be made to the Council that it place the issue on its agenda. In essence the procedure followed by the Council was substantially similar to that undertaken by the Committees. The difference lay in the greater publicity and enhanced prestige and moral suasion attendant upon the Council's deliberations.[79]

While information on the substantive aspect of the Committees' work is not available in detail, some impression of the type of disputes which arose and the remedial measures taken can be gained from an examination of the Council records. A total of 521 petitions were received during the period from 1929 to 1939, of which 225 were declared non-receivable.[80] The facts complained of varied from charges of individual acts of discrimination and violence[81]—including alleged unjustified hiring and firing policies,[82] denials of pension rights,[83] non-recognition of citizen-

[79] AZCARATE, *op. cit. supra* note 22, at 118-119.

[80] No statistics were published prior to the Council Resolution of June 13, 1929, *supra* note 74. Thereafter they were published annually as follows:

Year	*No. of Petitions Received*	*No. of Petitions Rejected*	*Source*
1929–30	50	26	11 O. J. 827 (1930)
1930–31	204	131	12 O. J. 1605 (1931)
1931–32	101	21	13 O. J. 1487 (1932)
1933	57	20	14 O. J. 997 (1933)
1934	68	18	15 O. J. 975 (1934)
1935	46	9	16 O. J. 994 (1935)
1936	19	6	17 O. J. 930 (1936)
1937	15	7	18 O. J. 609 (1937)
1938	14	4	19 O. J. 641 (1938)
1939	4	3	20 O. J. 370 (1939)

[81] Azcarate, former member and Director of the Minorities Section, indicates that the great bulk of the petitions received by the League concerned complaints against acts of violence, repression, and terror meted out to minority groups and that in most cases little could be done to alleviate the situation. AZCARATE, *op. cit. supra* note 22, at 66-73. Two problems reported in the Official Journal stemmed from individuals seeking compensation for injuries received in the course of public anti-minority demonstrations where the government had failed to take precautions or refused to punish the offenders. In the two reported cases the Committee concluded that the governments had not been delinquent and recommended no action by the Council. 15 O. J. 479, 976 (1934).

[82] Two such petitions were submitted to the Council by members of the Hungarian and German minorities in Czechoslovakia. In the case of the former, the Committee found no evidence to justify petitioners' claim of unjustified dismissal from their jobs as railwaymen and recommended that no action be taken by the Council. 14 O. J. 1120 (1933). In the other petition complaint was made of an administrative circular issued by the Czech Ministry of National Defense imposing certain conditions with respect to the hiring and firing of employees by firms engaged on government contracts. The Czech government pointed to its various legislative enactments, forbidding the insertion in government contracts of any conditions with respect to Czech race and in particular forbidding dismissal of any employee by reason of the fact that he was not of Czech race, and further declared that the Circular in question had never been made effective. On these representations, the Committee recommended that no action be taken. 18 O. J. 607-608 (1937).

[83] Several petitions involving this subject were presented to the League from minorities in both Czechoslovakia and Rumania. In general in the case of the Czech complaints the pensions had been

ship status,[84] and confiscation of press facilities[85]—to protests against agrarian reform legislation,[86] denial of rights to establish schools and share in public funds devoted to educational purposes,[87] or failure to implement the grant of political or religious autonomy[88] as provided for in the treaties for certain groups.[89]

In general the major substantive difficulties encountered in the consideration of petitions related first, to the interpretation of the treaty provisions defining a minority; and second, to the implementation of the guarantee to minorities of equality of treatment in law and in fact. The minorities treaties defined a member of a minority group simply as a person "belonging to a racial, religious or linguistic

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denied because claimant was not of the required nationality (14 O. J. 465 (1935)) or was ineligible under the law by reason of his service in an enemy army (15 *id.* 1121 (1934) and C. 394. 1929. I). In both cases the Committee recommended no action on the part of the Council. In the case of the Rumanian petition, the issue was one primarily of compensation for the expropriation of petitioners' property and the settlement of petitioners' claims for pensions. The Council took cognizance of the dispute and eventually succeeded in compelling Rumania to recognize its liability. 16 O. J. 453 (1935) and 18 *id.* 314 (1937).

[84] This was a continuing problem for the League despite the comparatively detailed provisions of the minorities guarantees and the peace treaties relating to this subject. The petition raised both factual and legal questions. The question was of considerable importance, since in many cases it was the determinative issue in the eligibility of the petitioner for minority protection. See, *e.g.*, 5 O. J. 1309 (1924), 13 *id.* 185, 961 (1932), and C. 517. 1926. I.

[85] In two cases published in the Journal, the Committee concluded that the seizure and confiscation had been in accordance with the law which was adjudged to be non-discriminatory in application. 15 O. J. 1119-1120 (1934), and 17 *id.* 518-519 (1936).

[86] Complaints of this nature were directed against agrarian reform legislation carried out by almost all the minority nations and formed one of the most difficult questions which the League had to consider; see *e.g.*, petitions submitted by the Ukrainians against Lithuania, note 72 *supra;* by German minorities against Czechoslovakia, C. 568, M. 339. 1922. I, and C. 95, 1925. I; and by Hungarians against Rumania, 7 O. J. 1084-1087 (1926), 12 *id.* 2043-2044 (1931), and 13 *id.* 1238-1239, 1738 (1932); and pp. 617, 618 *infra.*

[87] See *e.g.*, petition of Greek-Catholic Hungarians Committee against Czechoslovakia alleging deliberate Czech policy of denationalization, non-recognition of claimants' Hungarian nationality, and compulsory attendance at Ruthenian rather than Hungarian schools. C. 361. 1923. I. Also German minority petition against Czechoslovakia for latter's failure to allocate equitable share of educational budget to German Academy of Music. C. 387. 1926. I. Hungarian minority petition against Rumania alleging educational discrimination in Transylvania by reason of the Rumanian "Cultural Zone" policy, which was designed to remedy the scholastic inferiority of the Rumanian population in the area by bringing in additional teachers from outside the area, offering them higher salaries, and requiring that the teaching be done in the Rumanian language. 13 O. J. 157, 1109-1119 (1932), and 14 *id.* at 428 (1933). Jewish petition against Hungary protesting its "numerus clausus" education law requiring that university enrollments be accepted only from those of unimpeachable loyalty, that the number of students of different races and nationalities should be in proportion to the inhabitants, and that each race should be represented in a proportion of at least 9/10 of its respective population. 7 O. J. 145 (1926).

[88] See, for example, numerous petitions submitted on behalf of the Ruthenians in Sub Carpathanian Russia alleging that Czechoslovakia was not fulfilling her obligations under the minorities treaties to grant the area full political autonomy. While the Council accepted jurisdiction of the issue, it showed extreme sympathy with the Czech position that the illiteracy of the Ruthenians and their lack of economic and administrative training made it impossible to grant the area full autonomy and that a period of education and training must occur before the population could accept its responsibilities. C. 491. M. 354. 1921. I; C. 821. M. 310. 1923. I; C. 190(a). 1924. I; C. 331. M. 107. 1924. I; C. 654. M. 217. 1927 I; C. 21 M. 12. 1931. I. B.

See also, complaint submitted by minorities on Mt. Athos against Greece protesting against Greek assertions of right to supervise admission of foreigners to the territory. 13 O. J. 307-308 (1932).

[89] For more detailed summary of some of the substantive problems brought to the attention of the League, consult L. P. MAIR, THE PROTECTION OF MINORITIES 76-220 (1928); JACOB ROBINSON AND OTHERS, WERE THE MINORITIES TREATIES A FAILURE 113-122 (1943); AZCARATE, *op. cit. supra* note 22, at 61-91.

minority."[90] While the League never laid down in express terms the affirmative criteria which it employed in interpreting this provision, it did rule that minority status was neither predicated on the domicile[91] or origin[92] of the minority nor on their numerical strength.[93] Two other questions relating to minority identity were referred to the Permanent Court of International Justice for decision. In the first case, involving a dispute over the citizenship rights provisions in the Polish treaty,[94] Poland denied the competence of the League on the ground that the persons involved were not Polish nationals and hence were not entitled to minority status. The Court ruled against the Polish claim, pointing out that certain of the rights guaranteed in the minorities treaties were expressly stated to be applicable to inhabitants and that Article 12 placing these rights under the League guarantee made no qualification as to nationality. Hence non-nationals, if members of a minority group, were entitled to petition the League for protection of those rights which were not expressly restricted to nationals. The second case arose under the provisions of the Upper Silesian Convention guaranteeing minorities the right to attend schools of their own selection.[95] Poland claimed the right to deny recognition to registrations in minority schools emanating from persons who were not in fact members of the German minority. Germany contended, on the other hand, that membership in a minority was essentially a subjective matter and that a declaration of membership was sufficient to foreclose the question. In support of her contention, Germany cited Article 74 of the Convention which provided that "the question whether a person does or does not belong to a . . . minority may not be verified or disputed by the authorities." The Permanent Court rejected the German argument, adopting the somewhat anomalous position that while the question of minority identity must be regarded as objective, the declaration of an individual as to his status could not be disputed. The Court then added that:

> . . . it must not be inferred from this that the construction given above according to which the declaration must in principle be in conformity to the facts is therefore of no value. It is indeed of some importance to establish what is the situation at law.

Since the Court rendered its decision in the face of the express prohibition on verification, it would seem that under the general minorities treaties which contain no analogous prohibition, the criterion of minority status would be clearly regarded as objective in nature.

[90] See notes 31 and 47 *supra*.

[91] See claim of Germany protesting the receivability of a petition relating to Upper Silesia on the ground that the petitioner was not connected with the plebescite area by any permanent ties and resided there only temporarily. 14 O. J. 840 (1933).

[92] This claim was first raised by Lithuania in contesting the minority status of certain Ukrainians; see note 72 *supra*.

[93] See notes 72 and 92 *supra*.

[94] Acquisition of Polish Nationality, Ad. Op. No. 7, Sept. 15, 1923, 1 HUDSON 237.

[95] Rights of Minorities in Upper Silesia (Minority Schools), Judgment No. 12, April 26, 1928, 2 HUDSON 268.

Under the equality of treatment clauses, the Council was faced with an entirely different although equally important problem. Innumerable petitions were submitted by minority groups in all minority countries protesting against the discriminatory nature of agrarian reform legislation on the ground that it was directed solely at the expropriation of minority-held property.[96] While the legislation on its face was written in general terms, there was no question that statistically it affected minority groups more severely than majority ones in view of the fact that in many of the countries a major part of the land was owned by members of the minorities, while a majority of the population were peasants. Yet to have attempted to label the legislation as contrary to the minorities treaties by reason of its application would have been to condemn all agrarian reform legislation, which was regarded by these governments as the key to the economic and social consolidation of their country. In general, the Council refused to sustain the petitions, after painstaking investigation to ensure that the legislation was in fact a product of a national economic policy and not designed simply to impoverish and weaken minority groups. A second difficulty encountered in this respect arose out of the minority provisions conferring equal educational opportunities on all minorities. The fundamental question as to what constituted equality of educational rights was presented most graphically by the Albanian action in suppressing all private schools irrespective of their ownership by minority or majority,[97] thus confronting the League with the alternative of insisting on a privileged position for the minority or of permitting a state to deprive its minority groups of one of their chief means for the unhampered development of cultural and national consciousness. The question was submitted by the League to the Permanent Court for an advisory opinion. The Court ruled that despite the non-discriminatory character of the law, the legislation in fact deprived the minority of an institution essential to their existence and hence violated the minority treaty provisions guaranteeing equality of treatment in law and in fact. The Court pointed out that whereas equality in law precluded discrimination of any kind, equality in fact demanded the maintenance of an equilibrium between different situations and frequently would necessitate a different treatment for the minority in order to approximate the equality called for. In the instant case, in the Court's view, private schools constituted an essential organ for the satisfaction of the special needs of the minority. Hence their abolition by the state constituted an unfair discriminatory action in view of the fact that similar needs of the majority could be adequately supplied by governmental institutions.

Similar problems arose with respect to the traditional exercise by the state of control over the school program and curriculum of private schools—a control which

[96] AZCARATE, *op. cit. supra* note 22, at 61-66. In 1933 Germany sought to test the validity of the Polish agrarian reform legislation before the Permanent Court, but after the Court's denial of her request for an order to preserve status quo pending the outcome of the action, withdrew her case, to which Poland agreed. 3 HUDSON 292.

[97] Minority Schools in Albania, Ad. Op. No. 64, April 6, 1935, 3 HUDSON 484.

was not expressly provided for in the treaties but which could be utilized indirectly by a state to vitiate the practical effect of the Permanent Court's ruling in favor of the minorities' right to regulate their own educational institutions.[98] The League was never able to reconcile the conflicting interests involved. As Azcarate put it:[99]

> When we attempted in a friendly manner to extract some concession from the government nothing was easier for the latter than to justify its refusal on the grounds not only of its being under no treaty obligation but also of the risk involved by the uncertain attitude of the minority. And if we tried to convince the minority of the necessity and desirability of collaborating loyally with their new state, they cited the intolerant attitude of the government as the cause of their unhappy state.

Despite the impossibility in these cases of reconciling the conflicting interests of both minority and majority in situations in which right apeared to be equally divided, the League was able to alleviate some[100] of the more obvious injustices practiced against minority groups. With respect to agrarian reform legislation, where instances of actual discrimination could be proved, the League was able on several occasions[101] to obtain monetary compensation for the expropriated minority, although it seldom succeeded in securing restoration of the property. In other instances, League negotiations resulted in modification of the offending legislation.[102] There can be no question that in countless other situations the very existence of the League machinery constituted a deterrent to the adoption of extreme anti-minority

[98] AZCARATE, *op. cit. supra* note 22, at 77-81. Azcarate points out that on the one hand, the state refused to deprive itself of this potent weapon to weld the diverse population elements to a unified whole politically or to relax a control which it feared would be seized upon, not necessarily by the minorities themselves, but by a foreign state whose population was the same as the minority. On the other hand, to the minority, their schools were of value primarily as organs of minority culture. The rights they claimed to be entitled to under the minorities treaties were not simply to educate their children in their own language but also to teach in the form and spirit appropriate to their culture and national consciousness.

[99] *Id.* at 81.

[100] Least effective action on the part of the Council was taken with respect to those complaints alleging violence and repression meted out to minority groups. The delicacy of the political situation and the inadequacy of friendly pressure and persuasion *vis-a-vis* this type of governmental action accounted in part for League impotence in these matters. AZCARATE, *op. cit. supra* note 22, at 66 *et seq.*

[101] After protest to the League by the Ukranian minority in Lithuania against a section of the Lithuanian land reform law which confiscated land formerly held by the Russian government, a new law was enacted providing for compensation of the expropriated landowners up to 50 percent of the land value and also for the eligibility of such persons for a share in the redistribution of the land. The new law was undoubtedly enacted as a result of League pressure. 11 O. J. 967-968 (1930). Similar concessions were secured as a result of League efforts with respect to Rumanian confiscations of Czeckler property in Transylvania. 7 O. J. 1084-1087 (1926); 12 *id.* 2043-2044 (1931); 13 *id.* 1238-1239, 1738 (1932); 16 *id.* 453 (1935); 18 *id.* 314, 270-271 (1937). See also petition of Bulgarian Monastery on Mt. Athos against Greek failure to pay compensation agreed upon for expropriation. The League was able to straighten out the dispute. 11 O. J. 829 (1930); 13 *id.* 155-156 (1932).

[102] See, for example, petition relating to Czech circular governing hiring and firing policies for industries working on government contracts. See note 82 *supra*. The Czech government in its reply, while denying the discriminatory nature indicated that the circular was not put into effect—a result which very probably was induced by the representations of the League. Also Hungarian protest against Rumanian educational policies with particular reference to the use of allegedly biased textbooks—as a result of League concern, certain of the offending textbooks were withdrawn. 13 O. J. 157, 1109-1110 (1932); 14 *id.* 428 (1933).

measures. While League difficulties in enforcing observance of minority rights were frequently unrelated to substantive defects in the drafting of minorities treaties, it would appear that many arguments employed by minority states to justify their recalcitrant position might have been avoided had the substantive provisions been specified in greater detail and with greater precision.[103]

During its operation from 1920 to 1939, the minority system was subjected to constant criticism from both minority groups and minority states. The petition system was the most consistent target of this criticism. It was urged that a minority should be required to submit its complaints through its own government, in this way providing the latter with an opportunity of remedying the action complained of before League intervention, and at the same time encouraging a minority to look to its own state in the first instance for satisfaction of its grievances.[104] While a majority of the League was unwilling to accept the proposal—apparently seeing it primarily as a means to restrict the operation of the system—it would seem that the reasons advanced in its support constitute potential advantages outweighing the possible disadvantages of the device being used as a delaying tactic. A somewhat similar plan was successfully adopted in the Upper Silesian minority procedure by the institution of the local minorities offices to which petitions were submitted in the first instance. Moreover, the principle accords with the familiar concept of exhaustion of administrative remedies which has seldom caused undue hardship or injustice in municipal practice. A second objection to the minority system was its extension of the right to petition to non-minority groups,[105] because of the abuse to which that right was subject in the hands of groups desiring to exploit the minority cause for their own purposes. The refusal of the League to adopt a modification of this aspect of the system would appear to be wholly justified. To have prohibited the right of petition to international organizations, for example, might have constituted a severe handicap to the less advanced minority groups who were either unaware of their international rights or too weak to advance their own cause. Moreover, protection against the type of abuse mentioned could, it would seem, be best secured through a strict enforcement of the proper conditions of receivability and a careful screening procedure for petitions, such as was performed by the Minorities Section and the Minorities Committees.

Proposals with respect to the petition system were not confined to those designed to restrict its scope. Several nations urged that the system was too restrictive of minority rights and that the role of the individual petitioner should be expanded to

[103] Azcarate disagrees with this position, preferring the greater flexibility which can be attained under more generalized provisions, and cites in support of his position the numerous difficulties which arose under the Upper Silesian Minority Convention despite its detailed substantive provisions. AZCARATE, *op. cit. supra* note 22, at 140-141. While flexibility is a desirable attribute, clarity of purpose must not be sacrificed on that account.

[104] This was first proposed by Poland in 1923, see note 62 *supra*. In 1929 the Canadian representative, M. Dandurand, made a similar recommendation to the Council during its 54th Session. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 87.

[105] See note 62 *supra*.

approximate that of a party plaintiff with a legal right to bring his complaint personally before the Council and to present his own arguments.[106] Underlying the proposal was a dissatisfaction with the temerity frequently displayed by the League in the face of obvious violations of the minorities treaties and a feeling that a right on the part of a complaining minority to present its case directly to the League would force the League into action. In part the dissatisfaction was due to a lack of publicity accorded to actual accomplishments of the League in the field of minority problems and a consequent feeling that nothing was being done. In part it stemmed from a belief that the system favored minority states over minority groups, since it provided no formal opportunity for the latter to present their side of the case. The proposal was met by the immediate objections of those who conceived of the role of the League not as a judicial tribunal but primarily as a supervisory body which sought by means of friendly pressure and informal negotiation to remedy the grievances complained of—an approach necessitated by the lack of sanctions other than moral suasion available to the League to compel a state to cooperate with its proceedings or comply with its decisions. While no fundamental objection is perceived to the guarantee of direct hearing rights to minority groups,[107] there is no assurance that the existence of such a right would have resulted in any substantial improvement in the effectiveness of the League system or in the ability of the League to assure that respect for minority rights which the system was established to promote. There is little evidence available which indicates that the minority's view of the dispute was not fully known to the investigating committee or that it tended to favor the minority governments over minority groups. The major difficulties encountered by the League did not lie in its inability to assert the justice of a particular complaint but rather in its attempts to negotiate solutions for the problems which presented themselves[108]—difficulties which would appear to be largely unrelated to the nature of the hearing right provided.

Two other proposals directly related to this problem were also made to the League during this period; one, that greater publicity be accorded to League activity in the minorities field;[109] and the other, that a permanent Minorities Commission

[106] This proposal was most vigorously supported by the Hungarian representatives. See particularly the debates in the 6th Committee at the 16th and 17th Sessions of the Assembly. O. J. Spec. Supp. Nos. 138 (1935) and 155 (1936). And in the Council: PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 129.

[107] GENEVA CONV. Art. 149, *supra* note 34. See also, STONE, *op. cit. supra* note 34, at 111-113.

[108] The only case of outright refusal to supply information requested by the League involved the Lithuanian government. After considerable negotiation and discussion Lithuania eventually supplied the necessary data.

Azcarate declares that the greatest difficulties encountered by the League in its efforts to negotiate successful solutions to minorities problems arose not with regard to national policies but with respect to violations occasioned by the hostility of local authorities towards the minorities. AZCARATE, *op. cit. supra* note 22, at 45.

[109] The question was repeatedly raised in the debates of the 6th Committee of the Assembly. See O. J. Spec. Supp. Nos. 99 (1931) and 109 (1932), and in the 54th Session of the Council. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 87-96. Increased publicity has been urged in JACOB ROBINSON AND OTHERS, WERE THE MINORITIES TREATIES A FAILURE 107 (1943). For considerations of factors militating against too much publicity, see AZCARATE, *op. cit. supra* note 22, at 118-119.

be established[110] with independent investigatory and visitorial powers similar to the Mandates Commission.[111] The question of publicity is difficult to resolve. Not all minorities disputes were of the nature calculated to arouse world opinion to act as moral pressure on the side called upon to make reasonable concession. Too much publicity accorded states the opportunity to justify their actions in terms of prestige and national security—arguments calculated to carry considerable appeal to all governments. Finally, because of the delicate nature of minorities work, carried on as it was in the midst of strongest political passions, and because of the reluctance of states to submit to international interference in what constituted "the most sensitive sphere of their political life,"[112] compromises were difficult to work out if too much public light were thrown on their progress, especially in the face of a hostile public opinion at home. On the other hand, complete absence of publicity surrounding the great bulk of League activity was not calculated to arouse public confidence in its work. Much of the criticism raised against the League was due to ignorance of the types of problems involved and the accomplishments which were achieved. The solution no doubt lies somewhere between the two extremes so that the public can be kept informed of what is being done without jeopardizing the progress of minority negotiations.

The proposal for the creation of a permanent Minorities Commission would seem to have considerable merit. Such a body would have lessened League dependence on the petition system for information as to the existence of violation—a dependence which inevitably resulted in predicating international protection on the strength and organization of minority spokesmen rather than on a basis of need.

In addition to these proposals directed towards the amendment of specific procedural aspects of the minorities machinery, the Assembly debates reflected a deep-seated dissatisfaction with regard to the operation of the system as a whole, which frequently stemmed from a fundamental disagreement both as to the efficacy of international supervision and as to the validity of the assumption that protection of group rights provided the key to the solution[113] of the problem of intergroup frictions.

[110] Proposal advanced by the delegates from Canada, Albania, The Netherlands, and Germany at various League sessions. O. J. Spec. Supp. Nos. 64, pp. 37-38 (1928), No. 99, p. 15 (1931), No. 90, p. 19 (1930), and PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 89-91. It has been favorably commented upon by C. A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 421 (1934) and by ROBERT W. SETON-WATSON, THE PROBLEM OF SMALL NATIONS AND THE EUROPEAN ANARCHY (1939).

[111] See Treaty of Versailles, Art. 22; for general treatise on the experience of the Mandates Commission, see QUINCY WRIGHT, MANDATES UNDER THE LEAGUE OF NATIONS (1930).

[112] AZCARATE, *op. cit. supra* note 22, at 27.

[113] The Assembly debates clearly bring out the lack of fundamental agreement on the question of whether the system of minority protection embraced in the treaties was directed towards the perpetuation of a system of cultural pluralism or rather towards a gradual assimilation of minority groups. See, for example, the discussion at the 8th Ordinary Session of the Assembly O. J. Spec. Supp. 54 (1927); and at 54th Session of Council in March, 1929. PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES, *supra* note 56, at 89.

On the one hand it was argued that a permanent solution for majority-minority frictions must ultimately depend on "internal evolution" through mutual agreement and good faith. Not only was external intervention and pressure incapable of taking the place of this normal method of development, the argument proceeded, but also the presence of the League system constituted an affirmative barrier in the way of such development since it tended to crystallize group consciousness and prevent their consolidation into the political life of the state. Moreover, it encouraged minority groups to look to third parties for the solution of their difficulties and thereby weakened their confidence in their own government.[114] At the same time, the system afforded hostile elements—both states and other organizations—an opportunity to harass minority nations and exploit the system for their own purposes of propaganda and the like.[115] Others opposed the system primarily because of its unequal application and contended that it should be either abandoned or generalized so as to be applicable to all states containing minority groups.[116] Proposals were therefore put forward for the formulation of a general convention on the question of minority protection.[117] Several states, however, opposed the system because of their conviction that the problem could be more harmoniously handled by the international guarantee of basic human rights to all persons, irrespective of membership in a minority or a majority group.[118]

On the other hand, it was argued that national feeling against minority groups was such as to render wholly inadequate normal channels of recourse available to the ordinary citizen and that international supervision was therefore essential. Rather than creating and solidifying group consciousness, the system offered the only means of protecting groups which already entertained a feeling of group identity—a protection which was essential if the cultural patterns of the dominant group were not to stamp out those held by less powerful entities. To attempt to meet this problem by a guarantee of basic rights to individuals would ignore the fundamental

[114] See arguments of Poland and Czechoslovakia discussed *supra* note 62.

[115] See note 114 *supra*. One example of this was the activity of the Macedonian National Committee, a terrorist and revolutionary organization with headquarters in Bulgaria and operating with at least tacit support of the Bulgarian government, which repeatedly submitted petitions protesting against Yugoslavian measures of oppression against its Macedonian minority. While the facts showed unmistakable violations of the Minorities Treaties, the League was placed in the position that if it made formal representations to the Yugoslavian government it would thereby be encouraging activities on the part of the Committee whose real objectives were political and unrelated to the interests of the minority whose cause it espoused. AZCARATE, *op. cit. supra* note 22, at 50, 69-70. Macartney, on the other hand, declares that the system was water-tight for purposes of preventing a complaint which was mere propaganda from reaching the Council. In fact, the system presented, in his opinion, a more serious danger that a valid complaint would be dismissed as propaganda. C. A. MACARTNEY, NATIONAL STATES AND NATIONAL MINORITIES 373 (1934).

[116] Azcarate has declared that in his opinion this inequality by itself was responsible for a substantial part of the hostile reaction on the part of the minorities countries against the minorities system, which they considered to be a humiliating restriction by reason of its limited application to certain states. AZCARATE, *op. cit. supra* note 22, at 56.

[117] Proposals for the formulation of such a convention were first advanced by Lithuania. O. J. Spec. Supp. No. 39 (1925). The subject was debated in several subsequent sessions of the Assembly. O. J. Spec. Supp. No. 120 (1933) and *id.* No. 130 (1934).

[118] This was the position adopted by the delegates from Haiti, The Irish Free State, Argentina, and Australia (O. J. Spec. Supp. No. 130 (1934)), and from Greece (*id.* No. 120 (1933)).

purpose of the system, which was to enable certain groups to preserve their cultural identity. The importance of this aspect of minority protection was emphasized by Count Apponyi, the Hungarian delegate to the Assembly. Discussing the transfer to Rumania under the peace treaty of the territories of Upper Hungary and Transylvania, which he characterized as the "oldest established centers of Hungarian culture," Count Apponyi declared:[119]

> These lands have been a home of Hungarian culture for many centuries and you will realize that even if they are lost to us politically we are anxious not to lose that wealth of culture that forms an integral part of the Magyar national patrimony.

The alleged inequality of the system was claimed to be justified by the special circumstances prevailing in the countries subjected to the minority system—circumstances created not solely by the presence in a country of different races or religions, but by the fact that a minority in one country was adjacent to a majority of its race, language, or religion in a neighboring country from whose territory it had been recently transferred.[120] Moreover, any attempt to generalize the system, it was agreed, would be confronted with insurmountable difficulties by reason of the singularly complex social and political phenomena which constituted the minority problem. As Dr. Benes pointed out, "its nature is different in every country; it hangs upon the historic development of both the majority and minority peoples concerned and upon their general culture and their political, social and economic conditions."[121]

Reconciliation of these conflicting viewpoints presents an impossible task. The shortcomings of the League system are undeniable. The system was unable in many cases to prevent outbursts of violence directed against minority groups. Nor was it able to instill in minority groups, particularly among the German minorities in Czechoslovakia and Poland, a sense of loyalty towards, and identification with, their new state. It cannot be denied, however, that in a limited sphere of cases the League was able to remedy at least a portion of the injustices practiced against minority groups. There is little indication that the existence of the League system operated *per se* to impede the harmonious adjustment of minority-majority relations. On the contrary, a former member of the League Minorities Section has stressed as perhaps the most significant contribution of the League system the fact that by drawing to itself the bulk of resentment engendered by both minority groups and minority states, it provided a release for tensions which might otherwise have manifested themselves in increased intergroup frictions.[122] In any case, its limited success

[119] Statement made in the course of debate in 6th Committee during 5th Session of Assembly, O. J. Spec. Supp. No. 23 (1924), p. 89.

[120] See, *e.g.*, remarks of Anthony Eden, British delegate, in course of debate on this question in 6th Committee during the 15th Session of Assembly. O. J. Spec. Supp. No. 130 (1934), p. 59; *id.* No. 39 (1925).

[121] Quoted by M. Massigli, French delegate, in 6th Committee during 15th Session of Assembly. O. J. Spec. Supp. No. 130 (1934).

[122] AZCARATE, *op. cit. supra* note 22, at 82.

in winning concessions or compromises from reluctant states attests to the ability of an international body to command a measure of support and cooperation—even though lukewarm and under protest.

Whether the minorities system would have been more effective had it placed primary emphasis upon individual rather than group rights; whether the limited application of the system constituted an impediment to its operation; or whether minority groups would have met with less ill treatment had there been no international supervisory body, are questions whose answers must necessarily remain speculative. In part, they have been rendered moot by the recent developments in the United Nations in the broad field of human rights. The establishment of a subcommission on the prevention of discrimination and the protection of minority rights,[123] despite its significant lack of progress during its two year existence, would seem to be indicative of a determination on the part of the United Nations that special protections should be accorded to minority groups beyond those accorded to the individual.[124] If such a system of protection finally emerges, it is clear that it will be of general application. Difficulties of definition, which inevitably arise in any attempt to establish such a universal system,[125] are apparently to be met by emphasizing as the chief characteristics of a minority, its existence as a well defined group clearly distinguishable from the rest of the population (objective criterion), and its desire for a measure of differential treatment (subjective criterion).[126] While the definition stresses the element of will and thus avoids one of the problems encountered by the League, several ambiguities are immediately apparent. Thus the definition furnishes no indication as to the nature of the objective factors required to prove that the group in question is well defined—particularly whether residence of the group will be material in this respect or whether the use of similar dialects or the practice of similar religious services will suffice. Nor is it clear whether in indicating the intent of the group for a measure of differential treatment, a simple declaration on behalf of a single member will suffice or whether a formal group statement to the UN is envisaged.[127] Also unanswered in the proposed definition is the time at

[123] The Sub-commission was established at the first session of the Human Rights Commission in 1947 after considerable debate as to whether two bodies should be created as urged by the delegates from India and Russia or whether both discrimination and minority protection should be assigned to one commission. A brief history of the Sub-commission is contained in U.N. Doc. E/CN. 4/sub./2/2, September, 1947; also UNITED NATIONS YEARBOOK OF HUMAN RIGHTS, 1947 425 (1949).

[124] The representatives from the USSR have been particularly insistent that the U. N. consider the minorities question. See, for example, debate at the 5th meeting of ECOSOC, 2d sess. E/PV/5, pp. 49-50. However, the approval by the U. N. of the Genocide Convention would seem by itself to indicate the general concern which prevailed among all U. N. members for the protection of minorities. For text of convention, see Journal of the General Assembly, No. A/PV, 178, at 2-5a, Dec. 9, 1948. Note that the argument put forward by the United States in opposition to the inclusion in the Convention of a ban on cultural genocide was based on the reasoning that acts of this nature should be dealt with by separate treaties for the protection of minorities. ECOSOC Doc. No. E/623 at 11-13. Jan. 30, 1948.

[125] See pp. 602-603 *supra*.

[126] Report of Subcommittee on its first session, Nov. 24, Dec. 6, 1947, U. N. Doc. E/CN. 4/52, Dec. 6, 1947; and E/CN. 4/Sub. 2/38, Dec. 5, 1947; see also similar definition discussed at its second session, in May, 1949, U. N. Doc. E/CN. 4/Sub. 2/69, June 21, 1949.

[127] A draft resolution presented to the Sub-commission at its second session indicated the considera-

which such declarations must be made, specifically whether if once made it is subject to retraction, or, on the other hand, whether failure to make a declaration will forever foreclose the possibility of securing minority status. Despite these ambiguities, it would seem clear that the emphasis upon the subjective criterion would clearly eliminate "externally created" minorities from the reach of the system. Recourse by those persons against discriminatory treatment or denial of basic human rights would presumably have to be taken under the Covenant on Human Rights. In view of the diversity among minority group types, suggestion has been made that a further breakdown of minority groups be established to allow for a more flexible differentiation of rights according to group type.[128] While no specific implementation of this suggestion has as yet been forthcoming, the proposal would seem to have considerable merit, providing the classification would not devolve simply into separate minority systems for each state containing minority groups. The only substantive rights proposed to date to be included in the "charter" have related to the use of the minority language in school and in the courts.[129] It is not clear whether the substantive rights to be included will be confined simply to those designed to assure to minority groups the preservation of their cultural identity. Since presumably protection against discrimination and denial of basic freedoms would be available under the Human Rights Covenant, it would appear unwise and unnecessary to duplicate such protection in any minorities "charter." Procedural proposals have in general constituted little departure from the League system,[130] except for the scope of the petition right, which is to be limited to members of the United Nations, specialized organs, and non-governmental organizations.[131] In view of the accreditation requirements with respect to organizations desiring to secure non-governmental organization status under the UN charter,[132] it would appear that a greater measure of control over petitioning organizations will be available which may provide a salutary weapon in the hands of the UN against abuse of the petition right by such organizations. However, no comparable safeguards exist against similar abuse by member states. Moreover, the failure to date to provide for initial investigatory powers in some permanent body leaves the UN again dependent, as was the League,

tions on which effective protection must be predicated and that some type of formal demand for protection was intended. E/CN. 4/Sub. 2/69, June 21, 1949.

[128] *Ibid.*

[129] E/CN. 4/Sub. 2/60, June 20, 1949.

[130] Summary of proposals presented to second session of Sub-commission in 20 DEP'T STATE BULL. 812 (1949); also U. N. Doc. E/CN. 4/Sub. 2/44, June 14, 1949; E/CN. 4/45, June 14, 1949, E/CN. 4/49, June 15, 1949.

[131] *Ibid.*

[132] Art. 71 of the U. N. Charter provides that the Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with organizations after consultation with the member of the United Nations concerned. Pursuant to this provision a Committee on Arrangements for Consultation with Non-Governmental Organizations was established by ECOSOC to work out accreditation requirements. This Committee considers all applications for NGO status, which must be finally approved by the ECOSOC. U. N. Doc. E/C. 2/98.

on the initiative of member states and organizations for information on the existence of violations of minority rights. Today's split between east and west has furnished sufficient examples of the willingness of nations to use Charter violations as a vehicle for propaganda to warrant serious consideration for the establishment of machinery which places least reliance on, or furnishes least opportunity for, this type of activity. Finally, the system as it is taking shape would appear to offer no greater guarantee than the League in assuring states protection against the unwillingness of minority groups to identify themselves loyally with the over-all political goals of the state. Nevertheless, despite these shortcomings, on the basis of the proposals submitted to date, it would appear that the UN system for the protection of minorities if it finally emerges will have two major advantages over the League experiment. In the first place, by reason of its universal application and non-compulsory character, it should engender a more cooperative attitude on the part of those states which signify their willingness to adhere to the system. Moreover, its emphasis upon the desire of the group for differential treatment coupled with the availability under the Covenant on Human Rights of protection against discrimination and denial of basic freedoms should remove any incentive on the part of a group to maintain its group characteristics solely in order to claim the benefits of international protection as a national minority.

In the last analysis, the success of the system will depend not on the specific machinery adopted but rather on the spirit in which it is executed. The ultimate solution for intergroup frictions must rest on the development of mutual good will and respect as well as on a spirit of tolerance and appreciation for differences on the part of both minority and majority. The success of any international system of protection, whether of individual or of group rights, will be directly related to the extent to which the United Nations proves itself able to create and strengthen these attitudes among its member nations.

HUMAN RIGHTS IN THE PEACE TREATIES*

STEPHEN D. KERTESZ†

"The Charter recognizes that social progress and higher standards of life grow from larger freedom. Man does not live by bread alone. The Universal Declaration of Human Rights, one of the greatest achievements of the third session of this Assembly, constitutes a long stride forward in our efforts to free men from tyranny or arbitrary constraint. The United States attaches great importance to this work of the United Nations.

"This year we are confronted with a concrete issue in this field, the question of observance of human rights in Bulgaria, Hungary and Rumania. The treaties of peace with these countries set forth the procedures for the settlement of disputes arising under these treaties. Within the last few weeks Bulgaria, Hungary and Rumania have refused to follow these procedures.

. . . . . .

"This issue involves more than the violation of terms in a treaty. It affects the rights and freedoms of all the people who live in these three states."

Address by Secretary Acheson to the United Nations General Assembly on September 21, 1949.‡

The five Peace Treaties, signed on February 10, 1947, with their declarations of principle and concrete provisions for the protection of human rights and fundamental freedoms not only are the production of a long evolution but also are an integral part of a world wide aspiration for the protection of human rights. This program has received its most sweeping and inspiring formulation in the obligations assumed by member states in the United Nations Charter.

* The following abbreviations are used in the footnotes:
(1) DEP'T STATE BULL.—BULL.
(2) PARIS PEACE CONFERENCE 1946 SELECTED DOCUMENTS (U. S. Dep't State, 1946)—SELECTED DOCUMENTS.
(3) Treaties of Peace with Italy, Rumania, Bulgaria, and Hungary, *Hearings before the Senate Committee on Foreign Relations*, 80th Cong., 1st Sess. (1947)—*Hearings*.
(4) The Peace Treaties will be quoted in the following form: Peace Treaty with Bulgaria—B.T., Peace Treaty with Finland—F.T., Peace Treaty with Hungary—H.T., Peace Treaty with Italy, I.T., Peace Treaty with Rumania—R.T.

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‡ N. Y. Times, Sept. 22, 1949, p. 6, col. 1.

The principle enshrined in the long historical development and in these new agreements was fundamental in classical Roman Law: *"hominem causa constitutum omne ius."* In modern times the welfare of the individual is the *raison d'être* and the final aim of all well conceived democratic systems of law. The protection of human rights in international law is not an entirely new phenomenon. The importance of the Peace Treaties as of the United Nations Charter is in their direct and deliberate use of agreement to supplement the indirect and mostly ineffective concern of traditional customary international law for protecting the human being against the abuses of his own state. Americans may well be proud that the new landmarks embodied in the Peace Treaties are a result of the suggestion of their statesmen.

The human rights provisions, inserted into the recent Peace Treaties, are in harmony with, and represent a logical outcome of, a long development in international law and practice. This evolution began with the protection afforded to religious groups in the era following the Reformation. The principle *"cuius regio eius religio,"* inserted into the peace treaties terminating the great religious wars,[1] recorded progress of a kind after a period of general chaos and intolerance. This principle, however, did not protect the religious freedom of individuals. It left the door wide open for bigotry and persecutions, since it gave freedom to choose religion only to the rulers. The individuals were obligated to accept the official religion of the state or to emigrate. The Treaty of Vienna, concluded between the Emperor Rudolph II and Stephen Bocskay, the Protestant Prince of Transylvania, in 1606, offers an early example of religious freedom guaranteed for individuals in a Peace Treaty.[2]

The great body of international instruments guaranteeing religious freedom for individuals is of more recent origin and is mostly connnected with changes of sovereignty and recognition of new states. This became the general practice in the nineteenth century, especially in the course of dismemberment of the "sick man of Europe." The recognition of the new Balkan states, formerly belonging to the Ottoman Empire, was made conditional upon their acceptance of religious freedom. At the same time the Sultan was repeatedly pressed to make "spontaneous" declarations concerning religious tolerance.[3] For instance, following the Crimean war, the Sultan declared solemnly in a Firman that all his people were equally dear to him. By the same Firman all the existing privileges were confirmed, full religious liberty was guaranteed, and every Turk citizen, without regard to his faith, could hold official positions. These solemn declarations, however, did not prevent the periodically recurring persecutions and massacres of the Christian population in the Ottoman Empire, which caused general indignation in the western world.

[1] For example, in the treaty of Augsburg (1555), and in the Treaties of Osnabruck and Munster (1648) terminating the Thirty Years War.

[2] 5 JEAN DUMONT, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS, Pt. 2, 69-73 (1728).

[3] *Cf.* Art. IX of the Treaty of Paris, signed March 30, 1856 in Paris. 15 GEORG F. MARTENS, NOUVEAU RECUEIL DE TRAITÉS 774-775 (1857). In the same sense Art. LXII of the Treaty of Berlin, signed July 13, 1878. 3 GEORG F. MARTENS, NOUVEAU RECUEIL DE TRAITÉS 464 (2d ser. 1878.)

The protection of religious freedom, inserted into peace treaties and other international instruments, served sometimes as a pretext for political interventions. This was an especially favored tool of the Great Powers in their struggle in the Balkans. As early as 1774, in Article VII of the treaty of Kuchuk-Kainarji,[4] the Sultan recognized Russia as the protector of the Greek Orthodox population in his realm. The Roman Catholics were protected in the Middle East by France, in the Balkans by Austria. A quarrel between France and Russia over the religious buildings and holy relics in the Holy Land was one of the pretexts for the outbreak of the Crimean war.

In most of the cases the protection afforded in the sphere of religion implied protection of specific national minorities. There are a few instances in the nineteenth century when national minorities as such were given international guarantee. For example, Article I, Section 2 of the final Act of the Congress of Vienna, signed on June 9, 1815, guaranteed to Poles living under Austrian, Prussian, and Russian sovereignty the maintenance of their national institutions and a national representation.[5] This provision was used by Britain, France, and Austria at the occasion of their interventions, when Russia crushed the two Polish revolutions of 1830-31 and 1863-64.

Besides protection given to religious and national minorities, peace treaties in certain areas of the world guaranteed special rights and protection to foreigners. In the Middle East and Far East the development of the systems of the capitulations and concessions is the best illustration of this particular kind of protection.[6]

The treaty of Paris in 1856, followed by that of Berlin in 1878, introduced the system of the collective guarantee of the Great Powers.[7] It was thought that a collective system was more likely to eliminate the abuses of arbitrary interventions of certain Powers for selfish political purposes. The practical results, however, did not mean a step forward on the path of progress. There was no machinery and established procedure to deal with the violations. Thus the value of the collective guarantee remained more theoretical than real.

[4] 2 MARTENS, *op. cit. supra*, note 3, at 297 (1817).

[5] "Les Polonois, sujets respectifs de la Russie, de l'Autriche et de la Prusses, obtiendront une représentation et des institutions nationales, réglées d'après le mode d'existence politique que chacun des Gouvernements, auxquels ils apartiennent jugera utile et convenable de leur accorder." 2 MARTENS, *op. cit. supra* note 3, at 384 (1818).

The reserve included in the second part of this article is similar to some of the Soviet proposals put forward recently concerning the Covenant on Human Rights. For example, with respect to freedom of movement and residence, and freedom to leave a country, Mr. Pavlov proposed that these freedoms be subject to the laws of the country. He proposed that the freedom of religion article read: "Every person shall have the right to freedom of thought and freedom to practice religious observances in accordance with the laws of the country and the dictates of public morality." 21 BULL. 9 (1949).

[6] The first capitulation was concluded between France and the Ottoman Empire in 1535. By the Peace Treaty of Lausanne of July 24, 1923, the capitulations in Turkey were abolished. The Second World War swept away in China the remainders of the system of foreign concessions.

[7] Arts. XXII and XXVII of the Treaty of Paris, signed March 30, 1856, and the Treaty of Guarantee, signed April 15, 1856, in Paris. GEORG F. MARTENS, 15 NOUVEAU RECUEIL DE TRAITÉS 778-779, 790-791 (1857).

In western Europe the recognition of new states was not usually connected with a guarantee of religious freedom, as is illustrated by the recognition of the united Italy, the German Empire, the independent Belgium, or Norway. The principle of religious freedom was proclaimed by Article 6 of the General Act of the Berlin Conference in certain regions of Africa in 1885. This Act was signed by all important European states and by the United States.[8]

The peace settlements after the First World War introduced in the countries between the Baltic and the Eastern Mediterranean area a new system, which defined and enlarged the minority groups to be protected and endeavored to eliminate the shortcomings of the previous collective guarantees. The minorities provisions inserted into the Peace Treaties, and the special treaties concluded for the protection of national, racial, and religious minorities, offered detailed regulation and, at the same time, provided a procedure to ascertain the violations and to enforce the provisions protecting the minorities. The League of Nations became the guarantor of the enforcement of these provisions.[9]

There were justified complaints against this minority protection system. The system was far from being universal. It was established for, or rather imposed only on, certain countries. Besides many procedural deficiencies, the minority treaties did not provide for equality of economic opportunities and for adequate participation in administration. Thus, through economic pressure and administrative measures the minorities could be frustrated and deprived of the enjoyment of their rights in practically every field of human relationships. There was no question, of course, of recognizing the minorities as legal entities. Political and social minorities were not granted protection.

Despite many shortcomings of the system, the institutional protection, established at Paris for the first time in history, meant genuine progress. This was recently recognized even by one of the most dissatisfied countries, Hungary. The Hungarian government in a note addressed on August 19, 1945, to Great Britain, the United States, and Soviet Russia proposed to provide for the protection of minorities "by means of some international machinery of the United Nations." The same note

[8] MARTENS, 10 *id.* 418 (2d ser. 1885).

[9] The minority protection system was introduced into Albania, Austria, Bulgaria, Czechoslovakia, Estonia, Greece, Hungary, Iraq, Latvia, Lithuania, Poland, Rumania, Turkey, and Yugoslavia. The different international instruments for the establishment of the minorities protection system were: the so-called Minorities Treaties; the special dispositions inserted in the Peace Treaties and in other treaties; and Declarations by particular states made before the Council of the League of Nations. See LEAGUE OF NATIONS, PROTECTION OF LINGUISTIC, RACIAL OR RELIGIOUS MINORITIES BY THE LEAGUE OF NATIONS, PROVISIONS CONTAINED IN THE VARIOUS INTERNATIONAL INSTRUMENTS (Geneva, 1927), (C. 8, M. 5, 1931. I.); LEAGUE OF NATIONS, RESOLUTIONS AND EXTRACTS FROM THE MINUTES OF THE COUNCIL, RESOLUTIONS AND REPORTS ADOPTED BY THE ASSEMBLY RELATING TO THE PROCEDURE TO BE FOLLOWED IN QUESTIONS CONCERNING THE PROTECTION OF MINORITIES (Geneva, 2d ed. 1931); J. STONE, INTERNATIONAL GUARANTEES OF MINORITY RIGHTS (London, 1932); ANDRE N. MANDELSTAM, LA PROTECTION INTERNATIONALE DES MINORITES (Paris, 1931); JACOB ROBINSON AND OTHERS, WERE THE MINORITIES TREATIES A FAILURE? (1943); Kunz, *The Future of the International Law for the Protection of National Minorities*, 39 AM. J. INT'L L. 89-95 (1945). For further bibliography see 1 L. F. L. OPPENHEIM, INTERNATIONAL LAW 650 (7th ed., Lauterpacht, 1948).

added: "The protection afforded to minorities by the League of Nations undoubtedly justified certain adverse criticism, but at least there was some protection. In many cases the very fact that such machinery existed was sufficient to restrain governments planning oppressive measures against minorities. It will be an act of retrogression if even such protection is not granted in the future to national minorities."[10]

II

The five Peace Treaties signed with Bulgaria, Hungary, Finland, Italy, and Rumania in Paris on February 10, 1947,[11] signify a new departure. The minorities protection system was abandoned and a *general clause* concerning the protection of human rights and fundamental freedoms was inserted into the Peace Treaties.[12] For example, the Peace Treaty with Bulgaria states:

> Bulgaria shall take all measures necessary to secure to all persons under Bulgarian jurisdiction, without distinction as to race, sex, language, or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of expression, of press and publication, of religious worship, of political opinion and of public meeting.[13]

The peace treaty with Italy includes a guarantee, concerning the exercise of the fundamental human rights as defined in the above *general clause*, to all persons living in former Italian territories which have been transferred to other states.[14] In other words, two victorious states, Yugoslavia and France, are obligated to assure these fundamental human rights to all persons within the former Italian territories transferred to them. A third victorious state, Czechoslovakia, guaranteed full human and civic rights to the population of three villages ceded by Hungary.[15]

The Permanent Statute of the Free Territory of Trieste also embodied the *general clause*, with the addition that citizens of the Free Territory should be assured

[10] 1 HUNGARY AND THE CONFERENCE OF PARIS 13 (Hungarian Ministry for Foreign Affairs, Budapest, 1947). The minorities protection system is discussed in this issue by Mary G. Jones, *supra*.

[11] It was provided that the Peace Treaties shall come into force upon the deposit of ratifications by the major victorious Powers. This occurred on September 15, 1947.

[12] Ernest Bevin, the British Foreign Secretary, probably expressed in this respect the general way of thinking of the Western statesmen when, in June 1946, he gave the following explanations to the Hungarian Prime Minister: "You ask that the Czechoslovak-Hungarian peace treaty should, in a separate section, insure the rights of the Hungarian minority, a method tried unsuccessfully after the First World War. Nationality complaints arose after that, too. It would be much better to insert into every peace treaty all the basic human rights which should be guaranteed to all men regardless of nationality. The United Nations would exercise jurisdiction over such measures in the peace treaties and could rush to aid those nationalities whose rights suffered injury. Far better that the countries of the United Nations exercise control over these rights than that a single nation be left to keep to the letter of the treaty." FERENC NAGY, THE STRUGGLE BEHIND THE IRON CURTAIN, 236 (1948).

[13] Art. 2, B. T. The same provisions are embodied in Art. 6, F. T.; Art. 2 §1, H. T.; Art. 15, I. T.; Art. 3 §1, R. T.

[14] *I. T.* Art. 19 §4. The provision providing for human rights and fundamental freedoms of persons in Italian territories ceded to other states was originally a United States-Australian proposal which was attacked by the Byelorussian delegation at the Paris Conference. SELECTED DOCUMENTS 598.

[15] H. T. Art. 1, §4e. This provision is all the more conspicuous since, in 1945-1946, Czechoslovakia deprived her Hungarian minority of nearly all human and civic rights. 2 HUNGARY AND THE CONFERENCE OF PARIS 150-152, and 4 *id.* 176-186 (Hungarian Ministry for Foreign Affairs, Budapest, 1947). *Cf.* Kertesz, *Minority Population Exchanges: Czechoslovakia and Hungary*, 2 AMERICAN PERSPECTIVE 138-144 (1948).

of equality of eligibility for public office and that no citizen of the Free Territory should be deprived of his civil or political rights except as judicial punishment for the infraction of the penal laws of the Free Territory.[16]

Besides the *general clause,* the defeated countries were obliged to accept certain specific undertakings concerning human rights.[17] For example, all five treaties forbade the existence and activities of organizations of a Fascist type which have as their aim denial to the people of their democratic rights.[18] The defeated countries were obliged under the armistice agreement to set free, irrespective of citizenship and nationality, all persons held in confinement on account of their activities in favor of, or because of their sympathies with, the United Nations, or because of their racial origin, and to repeal discriminatory legislation and restrictions imposed thereunder. The Peace Treaties with Bulgaria, Finland, Hungary, and Rumania prescribe that no measures must be taken or laws enacted that will be incompatible with the purposes set forth in this provision.[19] The peace treaty with Italy only forbids the prosecution or molestation of Italian nationals, including members of the armed forces, on the ground that during the war they expressed sympathy with, or took action in support of, the cause of the allies.[20]

The Rumanian and Hungarian Peace Treaties contain special provisions that the laws of these countries will not, either in their content or in their application, discriminate or entail any discrimination on the ground of race, sex, language, or religion of the nationals, whether in reference to their persons, property, business, professional or financial interests, status, political or civil rights, or any other matter.[21]

III

In the course of the Second World War the aggressive dictatorships dominated their own people and the occupied countries by ruthless oppression and negation of human rights. This fact forced and hastened actions in the camp of the United Nations for an effective international protection of human rights and fundamental freedoms for all without discrimination as to race, sex, language, or religion. This idea was expressed in the various western and allied declarations about war and peace aims, like the "Four Freedoms" Message of President Roosevelt to Congress on January 6, 1941, the Atlantic Charter of August 14, 1941, the Declaration of the United Nations of January 1, 1942, the Yalta decision of the three major allies of February 11, 1945; and eventually was inserted into the Charter of the United Nations, which refers to human rights no less than seven times.

[16] Arts. 4 and 5, Permanent Statute of the Free Territory of Trieste, Annex VI to the Treaty of Peace with Italy.

[17] For the full text of the pertinent provisions of the five Peace Treaties, see UNITED NATIONS YEAR BOOK OF HUMAN RIGHTS FOR 1947 390-397 (1949). *Cf.* Andrew Martin, *Human Rights in the Paris Peace* Treaties, BRIT. Y. B. INT'L L. 392-398 (1947).

[18] Art. 4, B. T.; Art. 8, F. T.; Art. 4, H. T.; Art. 17, I. T.; Art. 5, R. T.

[19] Art. 3, B. T.; Art. 7, F. T.; Art. 3, H. T.; Art. 4, R. T.

[20] Art. 16, I. T.

[21] Art. 3, §2, R. T.; Art. 2, §2, H. T.

The provisions concerning the protection of human rights in the Peace Treaties concluded after the Second World War are due to American initiative and are based on American drafts. Answering a question in the course of the hearings before the Senate Committee on Foreign Relations, Secretary of State Byrnes pointed out that the ideal of fundamental human liberties and rights was at every stage of the negotiations before the American delegation. "Everything that we could possibly do to assure those rights and freedoms, we did," he stated.[22]

The insertion of the human rights provisions into the Peace Treaties was proposed by the American delegation at the first meeting of the Council of Foreign Ministers held in London from September 11 to October 2, 1945.[23] This proposition was preceded by a long discussion within the American Delegation. Irrespective of other political considerations, the American experts thought it would be futile to maintain the minority protection system without recognizing the legal personality of the minorities. Since such a solution was not practicable, the general protection of human rights seemed to be a convenient alternative.

In the London and Paris sessions of the Council of Foreign Ministers the main opposition between Russia and the Western Powers was centered around important political problems, like the questions of Trieste, the Danube, and some economic provisions of the treaties. The provisions concerning the protection of human rights were more or less considered harmless declarations of principle and did not arouse much antagonism among the Great Powers. Although no draft article was agreed on at London, the Soviet delegation accepted in principle that there should be in the Treaties an article along the lines of the American proposal. The detailed negotiations took place at the meetings of the Deputy Foreign Ministers in the winter and spring of 1946. There was no great difficulty in reaching agreement on the text of the human rights article as it now appears in the Peace Treaties. There was, on the other hand, considerable argument over the clause dealing with dissolution of organizations of a Fascist type. The Western delegations did not like this article and tried to change its wording so that it would not appear to give justification for violations of the human rights article. They proposed texts describing the organizations referred to as those which had as their aim the denial of the rights guaranteed by the human rights article. The final compromise formula which was accepted for the anti-fascist clause was hardly satisfactory from the point of view of the Western Powers.

It is not without interest to note that the UN Economic and Social Council recommended in the summer of 1946 that the Peace Treaties include provisions guaranteeing human rights in the former enemy countries. Although this initiative

[22] *Hearings*, 29.

[23] It was decided at the Potsdam Conference of July-August 1945, that the text of the peace treaties would be prepared by the Council of Foreign Ministers of the five victorious Great Powers. See for details, JAMES F. BYRNES, SPEAKING FRANKLY 69-72 (1947); Mosely, *Peace Making, 1946*, 1 INT'L ORG. 22-32 (1946); JOHN C. CAMPBELL, THE UNITED STATES IN WORLD AFFAIRS, 1945-1947 61-64 (1947).

was not responsible for the inclusion of human rights clauses in the five Peace Treaties, since in point of time it came after such clauses were proposed in the Council of Foreign Ministers, nevertheless it indicates a general feeling among UN members that such clauses should be included in the peace settlement.

At the Paris conference of twenty-one nations, in session from July 29 to October 15, 1946, the Italian, Bulgarian, Finnish, Hungarian, and Rumanian delegations were asked to submit to the conference their observations concerning the text of the Peace Treaties drafted by the Council of Foreign Ministers.[24] In comparison with the rather passive attitude of the Great Powers, with respect to the human rights clauses, the observations of some of the defeated countries are of particular interest in this field.[25]

The Bulgarian delegation simply referred to the fact that their own legislation had already applied, was applying, and would continue to apply the principles underlying the political clauses of the draft treaty.[26] The statement of the Finnish delegation was in a similar vein.[27]

The Hungarians welcomed the human rights provisions with some qualifications. They pointed out that the rights and freedoms enumerated in Article 2 of the draft treaty did not contain all the "Rights of Men" and proposed that this enumeration should be completed by an exact description of these rights, such as "the right to elect domicile, freedom to choose school language, freedom to work and to engage in a calling" and that the words "without distinction of race, sex, language or religion" should be completed by the insertion of the term "of nationality." Moreover, the Hungarian delegation pointed out that the mere reference to general human rights did not seem sufficient when defining the status of the minorities. They referred to an Aide-Mémoire presented on June 11, 1946, to the Council of Foreign Ministers by the Hungarian Government, and requested that corresponding provisions should be included in the peace treaty with Rumania.[28] The Hungarian delegation later submitted to the Conference a detailed project, a sort of international code, concerning the protection of minorities.[29]

The Italian and Rumanian delegations opposed the insertion of the human rights clause into the Peace Treaties. The Italians were of the opinion that the provisions in the draft treaty concerning the safeguarding of human rights and fundamental freedoms ought to be suppressed on the following grounds:

[24] At a meeting of the Foreign Ministers of the United States, the United Kingdom, and the Soviet Union in Moscow, December 16-26, 1945, it was agreed that the draft treaties prepared by the Council of Foreign Ministers would be examined by a general conference of the allied states and that, at the same time, the five ex-enemy states would be given an opportunity to state their views concerning the treaties.

[25] The most important materials of the Peace Conference were published by the Department of State under the title "Paris Peace Conference, 1946, Selected Documents."

[26] SELECTED DOCUMENTS 888.

[27] *Id.* at 1259.

[28] *Id.* at 1065-1066. The Aide-Mémoire was published by the Hungarian government. 1 HUNGARY AND THE CONFERENCE OF PARIS 135-141 (Budapest, 1947).

[29] 1 HUNGARY AND THE CONFERENCE OF PARIS 142-147 (Budapest, 1947).

(1) These were superfluous, since these fundamental freedoms and rights had always inspired the legislation of democratic Italy and these principles would be solemnly confirmed by the new constitution.

(2) The fact that these would form a treaty obligation on Italy's part might lead any of the signatory Powers to have recourse to this article in order to intervene in internal Italian affairs.

(3) It was to be expected that a general agreement on this matter would be reached under the auspices of the United Nations. Therefore, it would seem advisable to avoid a clause pre-establishing a juridicial situation whereby Italy—once a member of the United Nations—would find herself in this matter in a position different from that of other members. Such a situation would be inconsistent with the declared principle of equality among all members of the United Nations.

For all these reasons, according to the view of the Italian delegation, the insertion in the treaty of a special clause concerning human rights would not be justified unless its validity were terminated at the time when Italy joined the United Nations.[30]

The Rumanian delegation recognized the great value of the human rights principles proclaimed in Article 3 of the draft treaty, but questioned whether their inclusion in the peace treaty would not give rise to discrimination. The Rumanian statement explained by arguments similar to those of the Italians that it would be difficult to reconcile the retention of the special provisions of Article 3 of the treaty with "the principle of sovereign equality of all Members" of the United Nations (Article II of the Charter) on the day when Rumania became a member of the United Nations. Discrepancies in this respect between the system provided for in the Charter and that provided for in the treaty would establish a serious discrimination. In view of these circumstances the Rumanian government suggested that in Article 3 it should be simply stated that Rumania, in the exercise of her full sovereign rights, undertook to ensure the effective enforcement of those human rights which were contained in the Rumanian constitution.[31]

Notwithstanding the national sensibility of the Rumanians, the delegation of the United Kingdom, after the adoption of Article 3 of the draft treaty by the Political and Territorial Commission for Rumania, proposed the inclusion of Article 3A to read as follows:

> Roumania further undertakes that the laws in force in Roumania shall not, either in their content or in their application discriminate or entail any discrimination between persons of Roumanian nationality on the ground of their race, sex, language, or religion, whether in reference to their persons, property, business, professional or financial interests, status, political or civic rights or any other matters.[32]

[30] SELECTED DOCUMENTS 200-202.
[31] *Id.* at 706.
[32] *Id.* at 734.

The object of the British proposal was "to relieve the suffering of the Jews in Eastern Europe, by specifying the obligation of the Rumanian Government to respect the principle of non-discrimination between Rumanian nationals."

Since this proposal did not obtain the necessary two-thirds majority vote in the Political and Territorial Commission for Rumania,[33] it remained for the Plenary Conference to decide the matter by a special vote. Eventually Article 3A was adopted by a vote of 14 to 7 by the Plenary Conference,[34] and inserted both into the Rumanian and Hungarian peace treaties.[35]

IV

The Peace Treaties do not contain an exhaustive enumeration of human rights and fundamental freedoms. The *general clause* mentions, by way of example, the freedom of expression, of press and publication, of religious worship, of political opinion, and of public meeting. There were no discussions in the Council of Foreign Ministers and in the Conference of Paris about the meaning of these human rights and freedoms because there were no attempts to define their contents. The other human rights provisions are related to the previous internal policy and political regimes of the ex-enemy countries and are very far from being a part of a comprehensive system.

Secretary Byrnes in his report to the Senate, gave the following general explanations about the nature of the human rights provisions:

> Other benefits granted to the people of the ex-enemy states assure the maintenance of their basic human rights and fundamental freedoms. These clauses constitute an international obligation and assure other states the right to see to it that they are maintained. In the preparation of these guarantees we also took precautions to prevent the reemergence of identifiable prewar and wartime anti-democratic elements and the reemergence of prewar Fascism. No limitations upon the democratic freedom and development of the people are contained in the treaties.[36]

It is not by accident that the insertion of a list of human rights and a definition of their meaning was avoided during the peace-preparatory work. The reason for this policy was revealed on several occasions at the Paris Conference. The United States delegation objected to a Yugoslav proposal to be inserted into the Italian Treaty because the new article:

> attempts to define in detail certain of the human rights and fundamental freedoms which are covered by the broad language of draft article 14. Such particularization of the human rights and the fundamental principles is undesirable since they cannot all be enumerated in the draft treaty and omissions may lead to confusion with respect to the

[33] The Commission approved Article 3A by a majority of seven votes to five. *Id.* at 736. Mr. Bevin pointed out in the plenary session that: "It would be difficult for Great Britain to accept the treaty unless equal treatment were accorded to all nationals in Rumania." *Id.* at 818.

[34] *Id.* at 822.

[35] The same British proposal was made in the Political and Territorial Commission for Hungary. *Id* at 1113.

[36] *Hearings, 6.*

intent of the drafters. Consequently it is better not to try to improve on the broad language already contained in draft article 14.[37]

The motives for this attitude are further explained in a *Note* of the Legal and Drafting Commission of the Conference, which opposed an amendment of the Australian delegation. The Australians proposed the insertion into the Peace Treaty with Finland of a new section providing for the setting up of a European Court of Human Rights. In the view of the Commission:

> The practical application of Human Rights is a world-wide duty which, in accordance with the United Nations Charter, has been entrusted to the Economic and Social Council, which has set up a Commission on Human Rights. These two bodies are fully competent, both to establish the principles and to decide on the measures to be applied in order to ensure the guarantee of such rights.
>
> As long as no fundamental understanding has been arrived at on the principles involved, it is impossible in the present state of international law to compel a State to accept the decisions of an international legal body in this matter.[38]

This text clearly implies that the draftsmen of the treaty had in their mind a uniform standard of human rights to be defined by the competent bodies of the United Nations and did not want to create by the Peace Treaties a special system of human rights. According to their idea, the competent organs of the United Nations would fill up the human rights framework of the Peace Treaties with the necessary material contents. As to the difficulties which may arise meanwhile in the interpretation or application of the human rights provisions, the same *Note* of the Legal and Drafting Commission refers to the provisions of the Peace Treaties establishing a machinery for the settlement of the disputes concerning the interpretation and execution of the treaties.

A similar interpretation was given as to the implementation of the human rights provisions of the Peace Treaties by one of the chief American promoters of these

[37] SELECTED DOCUMENTS 422. Article 15 of the I. T. was Article 14 in the draft treaty.

[38] SELECTED DOCUMENTS, 1280, 1281. The same *Note* of the Legal and Drafting Commission has a somewhat different wording on p. 1329. The Australian proposal, put forward for the Italian and other Peace Treaties as well, intended "that a new Part should be included in the Treaty providing for the establishment of a European Court of Human Rights with jurisdiction to hear and determine all disputes concerning the rights of citizenship and enjoyment of human rights and fundamental freedoms provided for in the treaty. The Australian case for this proposal rested on the belief that the general declarations contained in the treaty in support of human rights and fundamental freedoms were not sufficient, standing alone, to guarantee the inalienable rights of the individual and that behind them it was essential that some sufficient sanction and means of enforcement should be established. It was proposed that the Court of Human Rights should have the status parallel to that of the International Court of Justice and that the Court would have the additional obligation of making reports to the Economic and Social Council of the United Nations on its working in relation to the rights within its jurisdiction. It was contemplated that the jurisdiction of the proposed tribunal should be voluntarily accepted by States as an essential means of international supervision of the rights of individuals and as a necessary method of giving force and effect to obligations accepted in general terms." SELECTED DOCUMENTS 444-445.

It is not without interest to note that the legal committee of the European Consultative Assembly voted 13 to 7 on September 1, 1949, to create an international court of human rights to guarantee basic freedoms in Europe. The proposed court would hear cases referred to it by an inquiry commission. The two bodies would enforce a proposed guarantee that a twelve-point "Bill of Rights" will be respected in the member states of the Council of Europe. N. Y. Times, Sept. 2, 1949. P. 3, col. 3.

clauses, Secretary Byrnes. He emphasized before the Senate Foreign Relations Committee that "it has the same assurance that every other provision in these treaties has."[39] He recalled that the American government always placed great importance on human rights and as far back as Yalta undertook to have the Three Powers agree as to these freedoms. The Peace Treaties, however, are of a different nature. "The ex-enemy state itself has solemnly obligated itself in this agreement to assure the fundamental freedoms. It is endorsed by the United Nations signing these treaties. It is the strongest assurance that I can think of."[40]

It is beyond doubt that according to the general rules of international law, the ex-enemy states have assumed special treaty obligations to secure human rights and fundamental freedoms to all persons under their jurisdiction. As to the assurances of the execution of these treaty obligations, the pertinent texts are to be found in the final clauses of the peace treaties. These provisions provide two kinds of procedures.

For a period not to exceed eighteen months after the coming into force of these treaties,[41] the Heads of the Diplomatic Missions of the chief allied powers in Rome, Sofia, Budapest, Bucharest, and Helsinki,[42] *acting in concert,* represent the United Nations in dealing with the ex-enemy governments in all matters concerning the execution and interpretation of the respective treaties. The Heads of the Diplomatic Missions of the allied powers were designated to give such guidance, technical advice, and clarification as might be necessary to insure the rapid and efficient execution of the respective Peace Treaty and the governments of the defeated countries were obliged to afford them all necessary information and assistance that they might require in the fulfillment of their task.[43]

The second method of settling disputes is of a more general nature and is not restricted by the time limit of eighteen months. Any dispute concerning the interpretation or execution of the treaties, which is not settled by direct diplomatic negotiations, shall be referred to the Heads of Missions of the chief allied nations.[44] If they do not resolve the dispute within a period of two months, it shall be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. "Should the two parties fail to agree within a period of one month upon the appointment of the third member, the

[40] *Ibid.*

[39] *Hearings,* 14.

[41] March 15, 1949, marked the conclusion of that period.

[42] In Rome the Ambassadors of France, the Soviet Union, the United Kingdom, and the United States; in Sofia, Budapest, and Bucharest the Heads of the Diplomatic Missions of the Soviet Union, the United Kingdom, and the United States; in Helsinki the Heads of the Diplomatic Missions of the Soviet Union and the United Kingdom.

[43] Art. 35, B. T.; Art. 34, F. T.; Art. 39, H. T.; Art. 86, I. T.; Art. 37, R. T.

[44] They are the same diplomatic representatives as in the previous case. See note 42, *supra.* *Cf.* M. Domke, *Settlement of Disputes Provisions in Axis Satellite Peace Treaties,* 41 AM. J. INT'L L. 911-920 (1947).

Secretary-General of the United Nations may be requested by either party to make the appointment."[45]

It is not without interest to note that in the Paris Conference the British, American, and French delegations proposed that any dispute concerning the execution or the interpretation of the Peace Treaty, which could not be settled by direct diplomatic negotiations, at the request of any party to the dispute, might be referred to the International Court of Justice. This proposition, strongly opposed by the Soviet delegation,[46] was accepted at the Conference by a vote of 15 to 6.[47] The Council of Foreign Ministers, however, under Soviet pressure, changed this rule in the sense indicated above and thus all reference to the International Court of Justice was eliminated from the Peace Treaties.

V

The optimistic expectations as to the interpretations and executions of the human rights provisions of the Peace Treaties have not been so far justified by practical experience. There were no complaints about violations of these provisions in Italy and Finland. In both countries individuals effectively enjoy a fair degree of civic liberties and freedoms in the western sense.

The situation is entirely different in Bulgaria, Hungary, and Rumania. These countries were liberated and occupied by Russian troops and have been living ever since under strict Russian control. The ideological clashes between East and West in the Danubian area are mainly centered around the meaning of the human rights clauses of the Peace Treaties. Some of the constitutional provisions of the satellite countries appear to give formal satisfaction in this respect.[48] In practice, however, these countries have gradually been transformed to police states ruled by a communist minority.

It has been one of the consequences of this evolution that in Eastern Europe the solemn pledges of Yalta are not kept. Various forms of Soviet interferences have hindered the formation of democratic institutions and representative governments through free elections. "A freely elected government in any of these countries would be anti-Soviet, and that we cannot allow," declared Marshal Stalin at Potsdam,[49] according to a member of the American delegation. The ruthless suppression of democratic freedoms made impossible the substantial implementation of the human rights clauses of the Peace Treaties.[50]

[45] Art. 36, B. T.; Art. 35, F. T.; Art. 40, H. T.; Art. 87, I. T.; Art. 38 R. T. According to the second paragraph of the same articles: "The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding."

[46] SELECTED DOCUMENTS 443-444.

[47] *Id.* at 608.

[48] Some of the relevant texts were published in the UNITED NATIONS YEARBOOK ON HUMAN RIGHTS, 1946 (1947), and in the YEARBOOK ON HUMAN RIGHTS, 1947 (1949).

[49] Philip E. Mosely, *Face to Face With Russia,* Foreign Policy Association, Headline Series, No. 70, 1948, p. 23.

[50] A Brief submitted in March, 1947, by the Rumanian-American National Committee to the Senate Foreign Relations Committee characterized the Rumanian situation in the following way:

In the heyday of Nazism, Goering allegedly said: "I determine who is a Jew." Similarly, the "Fascist, reactionary, and imperialist" denominations have no objective criteria in the communist vocabulary but have been freely used to silence persons opposing communist domination. In this spirit, the anti-fascist provisions of the Peace Treaties were one of the means for the elimination from the public life of persons who were reluctant to follow blindly the increasingly oppressive pattern of the communist puppet governments.

Shortly after the coming into force of the Peace Treaties, the Bulgarian, Hungarian, and Rumanian applications for membership in the United Nations were opposed by the United Kingdom and the United States mainly on the ground that these countries had systematically violated the human rights clauses of the Peace Treaties, and had thus refused to carry out the international obligations contained in the Charter.[51] Italy and Finland were not similarly accused but their admittance was vetoed by the Soviet Union. According to the Soviet and Polish point of views explained in the Security Council, all ex-enemy states are in the same position and must be admitted collectively at the the same time to the United Nations. At this occasion, the open clash in the Security Council made it clear that the meaning of the human rights provisions is entirely different according to Western and Eastern interpretation. The Eastern view was expressed by the Polish delegate: "the question of the manner in which a country fights for its internal security is entirely an internal problem of that country."[52]

"The principles contained in article 3 with regard to human rights and fundamental freedoms cannot but be endorsed by everybody. There are, however, no guaranties that these principles will be implemented. Rumania will therefore continue to have a quisling government imposed by the Soviet Union. As it is well known, this government, under the protection of Soviet troops, organized the most shameful mockery of elections last November. The United States Government has officially protested that these elections were not free; that they were marked by manipulation and terrorism, and that the franchise was effectively denied to important sections of the population." *Hearings*, 167.

In Rumania the Radescu coalition government was removed from office on February 28, 1945, following a Russian ultimatum, and was succeeded by the communist-dominated Groza government. Free elections never took place and the leaders of the democratic parties were put into jail or driven into exile. See J. F. BYRNES, SPEAKING FRANKLY, 50-53; N. RADESCU, FORCED LABOR IN RUMANIA (1949); R. H. MARKAM, RUMANIA UNDER THE SOVIET YOKE (1949). The development was similar in Bulgaria where Nicola Petkov, leader of the Agrarian Party, was executed. Hungary's position was unique in the sense that it is the only satellite country where "free and unfettered" elections took place, in November, 1945. At these elections the Smallholders Party received nearly 60 per cent of the votes and the Communists only 17 per cent. Despite the clear-cut non-Communist parliamentary majority, the Moscow educated Communist leaders dominated the Hungarian public life with the help of the occupying Soviet forces. The non-Communist Parties were gradually liquidated and their leaders forced into exile. See Schonfeld, *Soviet Imperialism in Hungary*, 26 FOREIGN AFFAIRS 554-565 (1948); FERENC NAGY, *op. cit supra* note 12.

Soviet violations of the respective treaty obligations are summed up in a document submitted to the Senate Committee on Foreign Relations, 18 BULL. 740-742 (1948). The whole evolution is described in more detail by I. A. Stone, *American Support of Free Elections in Eastern Europe*, 27 BULL. 311-323, 407-413 (1947). *Cf.* A. GYORGY, GOVERNMENTS OF DANUBIAN EUROPE (1949).

[51] UNITED NATIONS SECURITY COUNCIL, OFFICIAL RECORDS, SECOND YEAR, Nos. 90, 91, 92, September 25 and 29, and October 1, 1947. The question of admission of the Soviet satellites was brought again to the Security Council in 1948 and 1949.

[52] *Id.* No. 91, at 2447.

In the eighteen months' period, after the coming into force of the treaties, the United Kingdom and the United States governments have repeatedly made protests for flagrant treaty violations and requested information. The governments of Bulgaria, Hungary, and Rumania have refused to consider these representations and requests on the ground that in such cases the designated three Chiefs of Missions should act in concert. The Soviet Chiefs of Mission, however, were not disposed to cooperate with a view to action in concert. By this attitude the implementation of the Peace Treaties has been obstructed. A statement released by the United States government on March 16, 1949, held Bulgaria, Hungary, and Rumania responsible for violation or non-performance of their treaty obligations and alleged that the Soviet Union had brought about this situation.[53]

The last Western move in connection with the human rights clauses is still in progress. The United States representatives in Bulgaria, Hungary, and Rumania, in notes delivered on April 2, 1949, charged the three governments with having violated their obligations under the respective Peace Treaty articles requiring them to secure to all persons under their jurisdiction the enjoyment of human rights and the fundamental freedoms.[54]

The notes pointed out that the Bulgarian, Hungarian, and Rumanian governments had deliberately and systematically denied to their people, through measures of deprivation and oppression, the exercise of the very rights and freedoms which they had pledged to secure to them under the Peace Treaty. The note addressed to the Bulgarian government charged:

> Through the exercise of police power the Bulgarian Government has deprived large numbers of its citizens of their basic human rights, assured to them under the treaty of peace. These deprivations have been manifested by arbitrary arrests, systematic perversion of the judicial process, and the prolonged detention in prisons and camps, without public trial, of persons whose views are opposed to those of the regime.
>
> Similarly, the Bulgarian Government has denied to persons living under its jurisdiction, as individuals and as organized groups, including democratic political parties, the fundamental freedoms of political opinion and of public meeting. It has dissolved the National Agrarian Union, the Bulgarian Socialist Party and other groups, and has imprisoned many of their leaders. With the Treaty of Peace barely in effect and in the face of world opinion, the Bulgarian Government ordered the execution of Nikola Petkov, National Agrarian Union leader, who dared to express democratic political opinions which did not correspond to those of the Bulgarian Government. Proceedings were instituted against those deputies who did not agree with its policies, with the result that no vestige of parliamentary opposition now remains, an illustration of the effective denial of freedom of political opinion in Bulgaria.
>
> By restrictions on the press and on other publications, the Bulgarian Government has denied to persons under its jurisdiction the freedom of expression guaranteed to them dation on the part of its officials, the Bulgarian Government has made it impossible for

[53] 20 BULL. 391 (1949).

[54] The notes were published in 20 BULL. 450-453 (1949) and N. Y. Times, Apr. 3, 1949, §1, p. 1, col. 3 and p. 4, col. 1. The Canadian Government associated itself with the contents of the respective United States notes.

under the treaty of peace. By laws, administrative acts, and the use of force and intimi-individual citizens openly to express views not in conformity to those officially prescribed. Freedom of the press does not exist in Bulgaria.

By legislation, by the acts of its officials, and by "trials" of religious leaders, the Bulgarian Government has acted in contravention of the express provision of the Treaty of Peace in respect of freedom of worship. Recent measures directed against the Protestant denominations in Bulgaria, for example, are clearly incompatible with the Bulgarian Government's obligation to secure freedom of religious worship to all persons under its jurisdiction.

The political situation being similar in the three Danubian satellite countries, the notes addressed to the Hungarian and Rumanian governments have, *mutatis mutandis,* a similar content and tone. The note addressed to the Hungarian government points out particularly that by arbitrary proceedings against religious leaders, as in the cases of Cardinal Mindszenty and Lutheran Bishop Ordass, the Hungarian government has attempted to force the submission of independent church leaders and to bring about their replacement with collaborators subservient to the Communist Party. The note addressed to the Rumanian government alludes to the extensive control assumed by state authorities over the practice of religion, including the application of political tests. These powers have been used to destroy by government decree a major religious body, *i.e.,* the Greek Catholic Uniate Church, and to transfer its property to the state.

The satellite countries denounced the American note as an illegitimate interference in their domestic affairs and stated in their replies[55] that they had fully complied with the human rights provisions of the Peace Treaties.

The Bulgarian reply emphasized that:

After Bulgaria had been granted the most democratic Constitution in the world, and the people had been guaranteed legal power to exercise and defend its rights and freedoms, the Bulgarian Government, as government of a sovereign state, cannot agree to permit other states the appreciation of its acts, for which it is solely responsible to the National Assembly. This Government can even less agree to suffer the criticism of foreign powers, in so far as the activities of Bulgarian courts are concerned, being (in existence) by virtue of the Constitution and functioning in public in accordance with the most modern and most democratic of laws.

The Bulgarian Government will repel every attempt of interference in the domestic affairs of Bulgaria and will consider as an unfriendly act any attempt to force it to accept treatment as a state whose internal acts would be subject to judgment by foreign powers.

The Hungarian reply pointed out that it is the United States that launches reproaches against Hungary, "whereas it is notorious that in the United States serious discrimination exists between citizens of different race and color and that, by far, not every person can equally enjoy human rights." The Hungarian note, charging the United States with misinterpretations and repeated violations of the Peace Treaty, characterized the note of the United States as

[55] The full text of the replies was published in 20 BULL. 755-759 (1949).

an attempt at illegitimate interference in the domestic affairs of this country and a new phase in the campaign of reactionary incitement pursued by the imperialist quarters of the United States in the service of their aims threatening peace and directed against the Hungarian people's democracy.

The Rumanian reply, using a colorful diplomatic language, concluded that the note of the United States government:

endeavors to lead astray world public opinion which condemns its policy of racial discrimination, its barbarous acts of lynching, its drowning out of democratic political opinion, its trials of men of culture and representatives of the working people who fight for democracy and peace, its incitement to war and policy of aggressive pacts, its nurturing of breeding grounds of war, and its support of fascist bands which kill women and children *en masse*, all of which are in reality a brutal violation of the fundamental rights and liberties of men.

The United States government considered the satellite notes as unsatisfactory replies to specific charges,[56] and invoked the relevant Peace Treaty articles providing procedure for the settlement of such disputes.[57] At the same time, on May 31, 1949, the American Chiefs of Mission in the three capitals requested their British and Soviet colleagues to meet with them to consider the disputes in accordance with the procedure specified in the Peace Treaties.[58]

The Soviet government, in a note delivered in Washington on June 11, 1949, refused cooperation by the Soviet Ambassadors with the American and British Ministers in Bulgaria, Hungary, and Rumania in an effort to settle the disputes which had arisen about the fulfillment of the human rights obligations under the Peace Treaties.[59] The Soviet reply contended that:

Actions of the Governments of Bulgaria, Hungary and Rumania concerning which the Government of the United States expressed its dissatisfaction in notes of April 2, this year, are not only not a violation of the peace treaties, but on the contrary are directed toward fulfilment of peace treaties, which make it obligatory on countries in question "to wage a struggle against organizations of a Fascist type and other organizations which pursue the aim of depriving the people of their democratic rights."

Of course, such measures carried out by Bulgaria, Hungary and Rumania for the purpose of carrying out the articles of the peace treaties are fully within the domestic competence of these countries as sovereign states.

The Soviet Government appraises the endeavor of the United States Government artificially to convert this question into a subject of dispute as a direct attempt to make use of the peace treaties for intervention in the internal affairs of Bulgaria, Hungary and Rumania, with the view of bringing pressure to bear on their internal policy.

Following the Soviet refusal, the British and the United States governments, in notes of August 1, 1949, *i.e.*, after the elapse of the two months' period prescribed by the Peace Treaties, asked the governments of the three satellite countries to join them

[56] *Id.* at 759.

[57] Notes were delivered in this sense by the American Legations in Sofia, Budapest, and Bucharest. *Id.* at 756, 758, 759.

[58] Art. 36, B. T.; Art. 40, H. T.; Art. 38, R. T.

[59] 20 BULL. 824-825 (1949); N. Y. Times, June 14, 1949, p. 20, cols. 1 and 2.

in appointing the Commissions provided by the Peace Treaties for the settlement of disputes.[60] Since the satellites refused to join in setting up these Commissions, the United States expressed once more in a note of September 19, 1949, its determination to secure compliance by the satellite governments with their treaty obligations.[61] Secretary Acheson, in his address to the United Nations General Assembly on September 2, 1949, pointed out that the United States favored submission to the International Court of Justice of the question whether the three Danubian governments were under obligation to carry out the treaty procedure.[62]

The observance in Bulgaria and Hungary of human rights and fundamental freedoms including questions of religious and civil liberties, with special reference to the trials of Cardinal Mindszenty and other church leaders, was raised by the Bolivian and Australian governments before the third session of the United Nations General Assembly. The legal and political problems involved were debated at length in the General Committee, in an *Ad Hoc* Political Committee, and in the General Assembly. Eventually, the General Assembly adopted on April 30, 1949, by a vote of 34 to 6, a resolution expressing deep concern at the grave accusations made against the two governments and noting with satisfaction that steps had been taken by several states signatories to the Peace Treaties with Bulgaria and Hungary regarding these accusations. The resolution expressed "the hope that measures will be diligently applied, in accordance with the Treaties, in order to ensure respect for human rights and fundamental freedoms" and drew "the attention of the Governments of Bulgaria and Hungary to their obligation under the Peace Treaties, including the obligation to cooperate in the settlement of all these questions."[63] It was decided to retain the question on the agenda of the fourth session of the General Assembly.

Secretary of State Acheson, on September 14, 1949, disclosed to a news conference that the human rights violations of Bulgaria, Hungary, and Rumania were a matter to be considered by the United Nations Assembly, since these countries had "compounded their earlier violations by this subsequent refusal to carry out the procedures for the settlement of disputes, obligations which they specifically assumed in the peace treaties themselves."[64] The Australian Government has also proposed that the fourth session of the United Nations General Assembly take up the question of human rights in Rumania at the same time that it reviews the religious trials and other similar human rights problems in Bulgaria and Hungary.[65]

[60] 21 BULL. 238 (1949); N. Y. Times, August 2, 1949, p. 4, col. 2. Since April 2, 1949, simultaneously with the American diplomatic action, an exchange of notes took place between the British government and the three satellite states. The texts of these notes and replies have been appended to a letter of September 19, 1949, from the United Kingdom Representative to the Secretary General of the UN. See UN Doc. A/990. The texts of the American exchange of notes with the satellite countries have been submitted to the UN Secretary General by a communication of Sptember 19, 1949. See UN Doc. A/985.

[61] N. Y. Times, Sept. 20, 1949, p. 4, col. 3.

[62] N. Y. Times, Sept. 22, 1949, p. 6, col 1.

[63] United Nations Doc. A/851. The text of the resolution was also published in 20 BULL. 613 (1949).

[64] N. Y. Times, Sept. 15, 1949, p. 1, col. 3, p. 7, col 6.

[65] N. Y. Times, August 24, 1949, p. 15, col. 6.

The United Nations General Assembly, on October 22, 1949, gave expression of its "increased concern" at the charges that religious and political freedoms were being violated in Hungary, Rumania, and Bulgaria and asked the International Court of Justice to examine the legal possibilities of an inquiry. Forty-seven members of the Assembly voted for a resolution to seek an advisory opinion from the International Court and to keep the charges on the agenda for reopening next year. Seven countries, including Yugoslavia, abstained, and only the five Soviet bloc states voted against the resolution.[66]

VI

The execution of the human rights clauses of the Peace Treaties would be, under normal conditions, a relatively easy matter, as is demonstrated by the examples of Italy and Finland. The protection of human rights in the ex-enemy states became an international obligation, assumed by them when they signed and ratified the Peace Treaties. The argument that this would be a matter of purely domestic jurisdiction is clearly not valid. Obligations solemnly pledged in an international instrument and accepted without reserve, cannot be considered subsequently as a matter of merely domestic concern. This is an elementary principle of international law: the denial of it would make the conclusion of treaties purposeless. This principle was emphasized by Stalin to Harry Hopkins, during the difficult days of Russia, in July 1941: "Nations must fulfill their treaty obligations, he [Stalin] said, or international society could not exist."[67] Stalin alluded in this remark to the treaty-breaking practice of Nazi Germany and stated that without a minimum moral standard nations could not co-exist. It is an unfortunate fact that since the conclusion of the war the Soviet policy has been disregarding this primary necessity for an orderly international life.

In reality, the controversy connected with the human rights is not of a legal nature. The actual difficulty lies in the fact that the three Danubian satellite states are from the point of view of practical international politics parts of Soviet Russia. All major decisions of the minority communist dictatorships reflect the attitude of Moscow. Thus, the whole problem of the execution of the Peace Treaties has been shifted onto a higher level, namely the sphere of major East-West controversies.

In the light of the above analysis, the prospects for securing fulfillment of human rights provisions in the Danubian satellite countries do not seem to be bright in the immediate future. In our bipolar world the issues in international relations are more centered around human rights and fundamental freedoms than around any other problem. The ideological differences seem to be of an overwhelming nature and importance. The deepest conflict between East and West is neither military nor economic: the issue is one of opposing ideologies, a contest for men's minds. Communist totalitarian dictatorship, like Nazi dictatorship, cannot tolerate free insti-

[66] N. Y. Times, Oct. 23, 1949, p. 1, col. 8, p. 14, col. 1.
[67] R. E. SHERWOOD, ROOSEVELT AND HOPKINS 328 (1948).

tutions but demands from each individual total allegiance and establishes total control over all human relationships. It is hardly conceivable that a communist minority government, puppet of a foreign state, would be willing to apply effectively provisions protecting rights and freedoms of individuals against the omnipotence of a totalitarian state. This is the reason for the non-execution of the human rights provisions of the Peace Treaties by the Danubian satellite countries.

Despite the recent discouraging experiences, the insertion of the human rights articles into the Peace Treaties cannot be considered futile. These clauses form concrete legal obligations, which may be used systematically as a means of pressure upon the Soviet satellites for more effective execution of human rights provisions. It is probable that, for the time being, protests of the West are not likely to bring about a fundamental change in the behavior of the satellites. This anomalous situation, however, may serve the purpose of focusing world opinion upon the necessity for a more operative human rights program, such as that being worked out by the United Nations. This trend, if supported by overwhelming public opinion in the free countries, must have, in the long run, a moderating influence upon the communist-dominated countries. With radio and other means of communication, nations cannot long be kept in watertight compartments by totalitarian dictatorships. The barbed wire planted on the western boundaries of the satellite countries cannot repel the march of ideas of human freedom and civic liberties. To support and further this inevitable evolution is the deeper significance and political utility of western actions based on the human rights clauses of the Peace Treaties.

BOOK REVIEWS

LEGAL PHILOSOPHY FROM PLATO TO HEGEL. By Huntington Cairns.* Baltimore: The Johns Hopkins Press, 1949. Pp. xv, 583. $7.50.

This volume provides one with a grand tour of legal philosophy in the grand tradition and, I hasten to add, a good deal more than that. To understand Mr. Cairns' remarkable achievement one needs to observe the task that he has here set for himself. In two previous volumes he discussed the relations of law to the social sciences[1] and to logic and the empirical sciences.[2] Here he looks at law from the point of view of philosophy.[3] The first desideratum of legal philosophy is "a systematic collection of the philosophic suppositions applicable to the legal order."[4] That explains why he wrote the book as he did. He has presented, if not an integrated system of philosophic suppositions, at least an orderly and amazingly interesting series of critical expositions of the philosophic suppositions of thirteen legal philosophers. To this he has added three original contributions: Numerous illustrations of the influence that these philosophers have had upon positive law and of the meanings of their conceptions for contemporary American law; a critical analysis showing the deficiencies of a philosopher's ideas; and some fragments of Mr. Cairns' legal philosophy, about which we shall presumably know more in his projected fourth volume, *The Elements of Legal Theory*.

The author's purpose explains his limited meaning of "legal philosophy," and this in turn explains his selection of thirteen men, and his exclusion of others. He does not deny the name of "legal philosophy" to the general theories of law which lawyers, working upward from the concrete problems of law, have constructed. He mentions Grotius, and one might add Bentham, Austin, Pound, and Cardozo as examples. None of these men has given us a general philosophy, to which his legal philosophy is subsidiary. Mr. Cairns has selected twelve philosophers who have done this: Plato, Aristotle, St. Thomas Aquinas, Francis Bacon, Hobbes, Spinoza, Leibniz, Locke, Hume, Kant, Fichte, and Hegel. To these he adds Cicero, who was a philosopher chiefly by reflected light, but whose inclusion is necessary to represent the Stoic influence on legal philosophy. The author makes a persuasive, though not always quite convincing, argument that each of these has contributed ideas of major importance to modern jurisprudence. While each of these philosophers has a separate chapter, in chronological order, the influences of the earlier ones on the later ones are frequently noted, and a comparison of their ideas serves to clarify each. Mr. Cairns is a man of ranging imagination and genuine erudition, and one may suspect he would have enjoyed writing this book from sheer love of knowledge.

How have these philosophers contributed to legal thinking, to theories of or about law? In his introductory chapter, entitled "Philosophy as Jurisprudence," the author classifies their influences as threefold: The development of methodology, the contribution of ideals, and a "profound practical intelligence."[5] While he does not rigidly adhere to this pattern in discussing each philosopher, it is the framework of his discussion and is worth examining.

* Secretary-Treasurer and General Counsel of the National Gallery of Art, Washington, D. C.

[1] LAW AND THE SOCIAL SCIENCES (1935).

[2] THE THEORY OF LEGAL SCIENCE (1941).

[3] Preface ix.

[4] P. 562.

[5] P. 6.

The author believes that jurisprudence has been more influenced by philosophy than have the other social sciences and that this explains the advanced position of jurisprudence among them.[6] Methodology includes not merely formal logic (which he deems indispensable, though not the whole of reasoning) but also all those methods by which philosophers have, through the ages, sought to test their premises and their conceptions: Socrates with his endless questioning, Descartes with his analysis of the way to solve difficulties, Kant's discovery of necessary truths, Whitehead's "reason" that transcends method and seeks a coordination in "the nature of things."[7] Methodology is related to and depends upon metaphysics and epistemology. This, together with the author's manifest interest in ideas rather than (but not to the exclusion of) ideals, explains why he carefully shows the logical chain (sometimes it seems a gossamer thread) that connects a philosopher's metaphysical premises with his conclusions about law. This is one of the remarkable features of the book.

The author's conception of an "ideal" is very loose and seems at times somewhat peculiar. He gives as an example Plato's ideal of justice: "Justice is doing one's own business and not being a busy-body."[8] But the "end" of law, he says, may be happiness, which may be attainable by pursuing other "ideals" of justice. Thus we have the conception of an "ideal" as an intermediate end, a means to some ultimate end. Do we not usually think of ideals as ultimate, even unattainable, ends? Another of his examples is the Rent Control Act (1919) for the District of Columbia, which laid it down as an "ideal" "that the Federal Government ought not to be embarrassed in the transaction of the public business."[9] Most statutory draftsmen would call this a "declaration of policy." He concludes that neither philosophy nor jurisprudence has developed a critical theory of ideals. Indeed, they have not provided a stable terminology. Nevertheless, philosophers of law have usually (perhaps always, if one includes authority and order as an ideal of the positivists) been prolific in ideals, and some of these are influential in the judicial process and in other governmental processes.

The third kind of contribution of philosophers has been their "practical intelligence" applied to legal problems. He remarks that many of the philosophers whom he has selected possessed an extensive knowledge of law and legal history: Plato, Aristotle, Cicero, St. Thomas, Kant, Fichte, Hegel, Bacon, Hobbes, Locke, and Hume. Because Mr. Cairns believes their practical contributions are important, he has devoted much space to expounding the views of each of them on various branches of the law, or on concrete problems of the legal order. Thus he summarizes Plato's discussion of contracts, property, the sale of goods, and a penal code; Hume on property and contract; Kant on real, personal, and real-personal rights, etc. While this is thoroughly done with a wealth of illustrations, it seems that a good deal of it is not very rewarding, unless one has an antiquarian curiosity. Each of them was in his application of "practical intelligence" limited by the social conditions of his age and by the problems of the legal order with which he was familiar. Kant's theory of rights (pp. 420-437) seems to be based on the modified Roman law that Kant knew, and even if it be true that Kant was the first major philosopher who developed the notion of the real right,[10] one would like to know if writers of legal treatises had not previously invented the idea. At all events, the philosophers have no doubt contributed valuable tools to analytical jurisprudence.

Two other self-imposed limitations serve as framework of Mr. Cairns' discussion of legal philosophy: The partial exclusion of political philosophy and of individual ethics.

[6] P. 15.
[7] P. 8.
[8] P. 18.
[9] P. 19.
[10] P. 414.

He has given each philosopher's views as to the justification and ends of the state, as a necessary part of his philosophy of law, without developing fully his political philosophy. This is a conventional division of labor in twentieth century scholarship, and on the whole, a useful one. Specialization has given the western world two great legal systems, the Roman-Western European and the Anglo-American, and an independent judiciary which strives, on the whole successfully, to separate law from politics and thus to protect the individual in society from the Frankenstein that is partly of his own creation. Moreover, since law is only *one* means of social control, it is well that lawyers do not have a monopoly of political philosophy. Mr. Cairns' book will, I believe, tell them much that they need to know about it, and thus help to correct one of the inherent defects of specialization.

The author's exclusion of individual ethics from legal philosophy follows the Kantian pattern, though not the Kantian criterion of exclusion. Kant taught that law was concerned solely with the external relations of men, while morals (ethics) was concerned with the purity of their motives in acting. As the author points out, this is an unworkable criterion for modern law,[11] which does take account of the state of mind of the actor as an operative fact. The exclusion of individual ethics has led the author to give only a passing reference to Spinoza's remarkable system of ethics. In the discussion of Aristotle's conceptions of justice, the separation is more difficult, and Mr. Cairns, like others, has been baffled by it.[12] Aristotle's division of Particular Justice into Corrective Justice (for controversies between individual litigants) and Distributive Justice (for the apportionment of rewards among citizens in proportion to their merits) has had a considerable influence upon legal thought down to the present time; and yet it does not adequately account for all of the primary categories of modern legal systems.[13] Mr. Cairns' separation of individual ethics from legal axiology, never too rigid, is justified by his methodology. A norm of conduct that ethics can urge by way of individual admonition may not be adapted to implementation by heavy-handed law. There are, as Mr. Cairns recognizes and as Pound has long ago pointed out, limits to effective legal action.[14]

Francis Bacon's philosophy of law, as here presented, seems worth rescuing from the oblivion to which it has been consigned by Anglo-American writers on jurisprudence. Bacon, long before Bentham, gave excellent reasons for the codification of English law,[15] formulated an admirable statement of the qualities of a perfect law,[16] and then developed for the imperfect qualities of English case law a theory of analogical extension that resembled Dewey's theory of logical method in law.[17] The author rightly concludes that Bacon deserves more attention than he has received in modern thought.[18]

The inclusion of Leibniz among the world's twelve great legal philosophers seems more dubious. Unquestionably he had a topflight mind. He was a simultaneous and independent inventor, along with Sir Isaac Newton, of the differential calculus, and his philosophical writings exhibited the attempt to construct a mathematical system. His philosophy of law is a specimen of a scientific system of ethics,[19] yet, as Mr. Cairns remarks, "it cannot be applied to the actual world in any meaningful sense."[20] That Leibniz' theory of teaching anticipated by two centuries the case method of legal instruction[21] is not a sufficient card of admission to this select company, for the substance of casuistry is older than Leibniz.

[11] Pp. 404-405.
[12] P. 121.
[13] Pp. 217-218.
[14] Pp. 225-230, 238.
[15] P. 325.
[16] P. 308.
[17] Pp. 118-123.
[18] Pp. 75, 191, 292.
[19] P. 211.
[20] P. 245.
[21] *Ibid.*

Mr. Cairns' comments are the liveliest part of the book, and he has generally done a tidy job in discussing briefly a wide range of topics. A few loose ends may be noted. The statement that the case of *Cooke v. Oxley*[22] "settled" the common law rule that "an offer must be accepted instantaneously, or it ceased to exist,"[23] seems erroneous, and the continuing power of the offeree to accept an offer is not a "fiction"[24] except in reference to a subjective theory of contract, such as Kant's. However, as Mr. Cairns indicates, neither the objective nor the subjective theory of contracts alone will serve to explain all the rules of contract law. Again, the parenthetical statement that Bentham followed Locke in extending the term "sanction" to include rewards as well as punishments[25] seems to be refuted by Bentham's cogent arguments *against* such an extension.[26] Furthermore, the author's statement that the efforts of modern juristic theory to employ the conception of "interest" as basic is "an effort to explain social phenomena in terms of psychic impulses to action"[27] appears to be a one-sided view of the interest theory, which certainly includes an external object of interest as indispensable, at least so far as law is concerned.

One surprising statement is made in the discussion of Cicero's sometimes cloudy and rhetorical theories of law:[28]

> "He saw that it was a mistake to defend jurisprudence on the ground of its usefulness to positive law, a lesson which modern jurists have even yet not learned."

A mistake, yes, to expect that any basic premise of a philosopher will solve with ease and clarity any one of the grist of cases awaiting decision in a trial court. Yet what is the purpose of Mr. Cairns' book if not to show that jurisprudence, as a body of theory about positive law, needs to be grounded in basic suppositions of philosophy? And is not jurisprudence useful to positive law?

Mr. Cairns does not overlook the desirability of an empirical method of evaluating the suppositions and objects of the legal order, but he offers only a hope that someday the methods of (natural) science will be applied to moral judgments.[29] He seems sometimes to imply that we have no empirical basis for legal evaluations, though at other times he apparently accepts conclusions drawn from two thousand years of human experience with the making and administration of law as having some reliability. He is not quite ready to accept a second-best legal "science," as Plato accepted a second-best state. At any rate, he seems to be right in believing that the great philosophers have contributions to make to the legal theorizing of our somewhat skeptical age, and he has produced an imaginative, learned, and impartial survey of those contributions.

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[22] 3 T. R. 653, 100 Eng. Rep. 785 (K. B. 1790).
[23] P. 427.
[24] *Cf.* p. 429.
[25] P. 357.
[26] JEREMY BENTHAM, THE LIMITS OF JURISPRUDENCE DEFINED 226 n. 5 (Everett ed. 1945).
[27] P. 43.
[28] P. 131.
[29] P. 566; see *supra* note 2.

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